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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 428

EL DORADO OIL WORKS AND EL DORADO TERMINAL COMPANY, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL AMERICAN TRANSPORTATION CORPORATION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED SEPTEMBER 13, 1945.

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[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 23619 G

EL DORADO OIL WORKS, a Corporation, and EL DORADO TERMINAL COMPANY, a Corporation, Plaintiffs,

vs.

UNITED STATES OF AMERICA, Defendant

BILL OF COMPLAINT—Filed August 24, 1944

El Dorado Oil Works and El Dorado Terminal Company, bring this their Bill of Complaint against the United States to set aside, suspend and annul a certain order of the Interstate Commerce Commission (hereinafter called the Commission) and in support of this, their prayer for such relief, complain and say:

I

El Dorado Oil Works, at all times herein mentioned, was and is a corporation organized and existing under and by virtue of the laws of the State of California; El Dorado Terminal Company, at all times herein mentioned, was and is a corporation organized and existing under and by virtue of the laws of the State of California; each of said plain- [fol. 2] tiffs is a resident of the State of California within the Northern District of California, Southern Division.

II

The order of the Commission hereinafter referred to, was made upon the petition of El Dorado Oil Works and El Dorado Terminal Company, and upon the motion of said Commission.

III

This suit is brought, in the said Northern District of California, Southern Division, under, and the jurisdiction of this Court is predicated upon, Acts of Congress approved June 18, 1910 (36 Stat. 539), March 3, 1911 (36 Stat. 1149) and October 22, 1913 (38 Stat. 219); Code of Laws of the

United States, Title 28 Sections 41, par. 28 and 43-48 inclusive, which confer upon the District Courts of the United States jurisdiction of suits to set aside, annul or suspend, in whole or in part orders of the Interstate Commerce Commission.

IV

Defendant, United States of America, is sued under Acts of Congress approved June 18, 1910 (36 Stat. 539), March 3, 1911 (36 Stat. 1149), and October 22, 1913 (38 Stat. 219); Code of Laws of the United States, Title 28, sections 41, par. 28 and 43-48 inclusive, set aside and annul or suspend a certain order entered by the Commission on the 10th day of April, 1944, in an investigation proceeding entitled "In the Matter of the Petition of El Dorado Oil Works and El Dorado Terminal Company for Investigation of Mileage Allowances by Interstate Carriers for the Use of Tank Cars of Private Ownership", Docket No. 28515. The proceeding was disposed of at a General Session of the Commission. The majority opinion was joined in by Commissioner Pat- [fol. 3] terson and Commissioners Splawn, Miller and Alldredge joined in a dissenting opinion. A copy of said Order of the Interstate Commerce Commission, together with a copy of its report upon which said order purports to be based, and the said dissenting opinion are attached hereto, marked Exhibit A and made a part hereof.

V

On the 7th day of June, 1944, plaintiffs filed with said Commission an application for Rehearing, Reargument and Reconsideration of said Order of April 10, 1944. In said application plaintiffs particularly averred that the Commission's order of April 10, 1944, herein complained of, was incomplete, inadequate and erroneous, that it was contrary to the evidence, unsupported by the evidence, impracticable and an usurpation of the province of the civil courts and in excess of the jurisdiction and authority of the Commission, that the Commission failed to make a finding on a material issue, that the conclusions were unsupported by findings of fact, that erroneous conclusions of law were applied and the Commission failed to give effect to the mandate of the Supreme Court in *General American Tank Car Corporation vs. El Dorado Terminal Company*, 308 U. S. 422. That said application for Rehearing, Reargument and

Reconsideration was denied by order of the Commission on or about July 31, 1944.

VI

That said order of the Commission dated April 10, 1944, purports to determine the lawfulness of the practices of plaintiffs under the terms of a contract dated September 28, 1933, between the El Dorado Oil Works and the General American Tank Car Corporation, and the reasonableness of the allowance to be paid by railroad carriers for the use of tank cars furnished such carriers by the El Dorado Oil [fol. 4] Works for the transportation of its products in interstate commerce during the period from January 1, 1934 to December 31, 1936. The said order purports to require that the maximum allowance to be paid by rail carriers to the El Dorado Oil Works for the use of tank cars furnished by it should not exceed the rental paid by El Dorado Oil Works under said contract of September 28, 1933. Said order further purports to deny El Dorado Oil Works any allowance from the rail carrier or carriers, directly or through the General American Tank Car Corporation for the expense of cleaning and preparation of the tank cars for the transportation of its commodity during the period of the agreement, January 1, 1934 to December 31, 1936. That said order fails to establish a uniform reasonable allowance to be paid to shippers by carriers for the furnishing of tank cars for use in the transportation of goods. In and by said order the Commission refused to establish a uniform reasonable allowance to be paid to El Dorado Oil Works and El Dorado Terminal Company, or to other shippers by carriers for the furnishing of tank cars for use in the transportation of goods during the period from January 1, 1934 to December 31, 1936, or during any other time.

VII

Plaintiffs allege that the said order of the Commission dated April 10, 1944, in so far as it purports to limit the reasonable allowance, as a maximum to be paid by the rail carriers to the El Dorado Oil Works for the furnishing of tank cars, to an amount not exceeding the rental paid under said contract of September 28, 1933, and to characterize as unjust, unreasonable and a preference any amounts paid in excess of said rental, and to deny an allowance for the

necessary cleaning and preparation of the tank cars during the period of said agreement, and fails to establish a uni- [fol. 5] form reasonable allowance to shippers for tank cars furnished to carriers for use in the transportation of goods, is without foundation in law, is based upon errors of law, is not supported by evidence, is not supported by adequate findings, is against the manifest weight of the evidence, is confiscatory, exceeds the regulatory power of the Commission and is arbitrary and void for the following reasons:

(1) Said order is not an order which the Commission is empowered to make under the provisions of the Interstate Commerce Act.

(2) The Commission failed to grant plaintiffs a fair and adequate hearing.

(3) The Commission failed to consider and give due weight to evidence introduced before it by plaintiffs.

(4) Said order and the findings of the Commission upon which it purports to be based are without any evidence whatever to support them.

(5) That the Commission failed to make findings upon a material issue.

(6) That the Commission invaded and usurped the province of the civil courts.

(7) That the conclusions of the Commission were erroneous in law.

(8) That said order is confiscatory.

VIII

The order of the Commission will, unless annulled, set aside and suspended, cause irreparable injury and damage to plaintiffs in that said order purports to be a final adjudication of the rights of plaintiff to an allowance for the furnishing of tank cars to carriers, and further purports to adjudicate the rights of plaintiffs under the terms of said contract of September 28, 1933, and to deny to plaintiffs [fol. 6] recovery of the moneys to which they are entitled under the said contract of September 28, 1933.

All of the matters herein alleged, plaintiffs offer to prove. Wherefore, plaintiffs respectfully pray:

First. That upon the filing of this petition the presiding Judge of this Court shall call to his assistance in the hearing and determination of this cause, two other judges, of whom one at least shall be a circuit Judge;

Second. That process may issue against the defendant, the United States of America:

Third. That after not less than three days' notice to the Interstate Commerce Commission and to the Attorney General of the United States, as provided by law, a hearing shall be held and a temporary stay or suspension of the said order of the Commission be issued, pending hearing and determination of plaintiffs' application for a final decree annulling, setting aside and suspending said order.

Fourth. That after not less than five days' notice to the Interstate Commerce Commission and to the Attorney General of the United States, as provided by law, a hearing shall be held, and a decree be issued staying and suspending the said order of the Interstate Commerce Commission.

Fifth. That upon final hearing of this cause a final decree shall be issued, decreeing that said order of the Commission as aforesaid, is null and void, and is set aside, annulled and suspended, and that its enforcement, execution and operation shall be forever annulled.

Sixth. That this Court grant to the plaintiffs such other and further relief as by it may be deemed proper in the premises.

W. F. Williamson, Williamson & Wallace, Attorneys for Plaintiffs.

[fols. 7-25] *Duly sworn to by S. M. Haslett. Jurat omitted in printing.*

[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENTION OF INTERSTATE COMMERCE COMMISSION

To the Honorable Judges of Said Court:

In accordance with the provisions of Section 212 of the Judicial Code (36 Stat. L. 1150, 28 U. S. C. 45a), we hereby enter the appearance of the Interstate Commerce Commission as a party defendant in the above entitled case, and of ourselves as its counsel.

Daniel W. Knowlton, Chief Counsel; J. Stanley Payne, Assistant Chief Counsel, Washington, D. C.

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed October 23, 1944

The Interstate Commerce Commission, intervening defendant in the above-entitled cause, for answer to the complaint herein, respectfully states:

I

The Commission admits the allegations of paragraph I of the complaint.

II

The Commission admits the allegations of paragraph II of the complaint.

III

Answering paragraph III of the complaint, the Commission admits that the Urgent Deficiencies Act of October 22, 1913 (39 Stat. 219; 28 U. S. C., sec. 41 (27) and (28) and secs. 43-48), confers jurisdiction upon the district courts of the United States, when specially constituted of [fol. 28] three judges, to enjoin, suspend, set aside, and annul certain orders of the Commission, and the Commis-

sion admits that this suit purports to be brought under that Act, but the Commission alleges that the order sought to be set aside in this suit is one of the nature which, under the terms of said Act as construed in decisions of the Supreme Court of the United States, is not reviewable under the provisions of said Act.

IV

The Commission admits that it made the report referred to in paragraph IV of the complaint, entitled "*Allowances for Privately-Owned Tank Cars*," decided April 10, 1944, a typewritten copy of which, together with the order of the same date, discontinuing the proceeding, is attached to the complaint marked "Exhibit A." An officially printed copy of the report, which appears in 258 I. C. C. 371, is appended hereto, marked "Exhibit No. 1."

V

Answering paragraph V of the complaint, the Commission admits that on June 16, 1944, plaintiffs filed with the Commission an application, dated June 7, 1944, for rehearing, reargument and reconsideration, and that the Commission denied the same.

Further answering said paragraph V, the Commission admits and alleges: In June 1935, the El Dorado Terminal Company (hereinafter called the Terminal Company), as assignee of the El Dorado Oil Works (hereinafter called the Oil Works), brought, in this Court, an action in assumpsit against the General American Tank Car Corporation to recover a sum alleged to be due it by the Car Corporation under the terms of a certain car leasing agreement. This Court rendered judgment for the Car Corporation. The judgment was reversed by the Circuit Court of Appeals, which held that the Terminal Company was en- [fol. 29] titled to the full amount claimed, 104 F. 2d 903, 916. The Supreme Court granted certiorari and in its opinion, rendered January 2, 1940, *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, it held that the suit was within the jurisdiction of this Court, since the action was an ordinary one in assumpsit on a written contract, and that the Court had jurisdiction of the parties, but it further held that the case involved an administrative question subjected by the Interstate Com-

merce Act to the administrative authority of the Commission and that, when it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the Court should have stayed its hand pending the Commission's determination of this administrative problem, namely, the lawfulness and the reasonableness of the practices of the parties under the terms of the Interstate Commerce Act. The Supreme Court further held that there should not be a dismissal, but that the cause should be held pending the conclusion of an appropriate administrative proceeding. Accordingly, the judgment of the Circuit Court of Appeals was reversed and the cause remanded to this Court for further proceedings in conformity to the opinion. Said cause is now pending in this Court.

Thereafter, the Oil Works and the Terminal Company filed a petition with the Commission, on June 7, 1940, citing the Supreme Court's opinion in the above-cited case, and requesting that the Commission determine the administrative questions involved in the aforesaid litigation. A copy of said petition (minus the agreement referred to therein, which is reproduced in the Appendix to the Commission's report) is appended hereto, marked "Exhibit No. 2."

By order dated July 24, 1940, the Commission instituted an investigation to determine said administrative questions, [fol. 30] naming respondents a large number of common carriers by railroad engaged in the transportation of coconut oil from California points to various points in the United States. A copy of this order is appended hereto, marked "Exhibit No. 3."

The matter was assigned for hearing and heard before an examiner of the Commission at San Francisco, Calif., December 9 and 10, 1940. The Oil Works and the Terminal Company, by their counsel, and the respondent carriers, by their counsel, appeared and participated therein. The General American Transportation Corporation, successor in interest to the General American Tank Car Corporation, by its counsel, also appeared at the hearing, there presented a petition for leave to intervene, which was granted, and participated in the hearing. Substantial evidence was submitted by the respective parties, the typewritten transcript of the testimony filling 271 typewritten pages, which was supplemented by eight physical exhibits (samples of

oil) and two documentary exhibits. A copy of the General American Transportation Corporation's petition for leave to intervene is appended hereto, marked "Exhibit No. 4."

After the close of the hearing the respective parties filed briefs. On May 14, 1941, an examiner's proposed report was issued and served, to which exceptions were filed by the Oil Works and the Terminal Company. On November 5, 1941, the proceeding was argued orally before the Commission at Washington, D. C., ten commissioners sitting.

On April 10, 1944, the Commission issued its report as aforesaid, containing its findings, determinations and conclusions upon the administrative questions presented to it. With the report the Commission issued an order which reads as follows:

[fol. 31] "*It appearing*, That by order dated July 24, 1940, the Commission, in response to a joint petition filed by El Dorado Oil Works and El Dorado Terminal Company, instituted an investigation to determine the lawfulness of the practices under the terms of a contract dated September 28, 1933, between the El Dorado Oil Works and the General American Tank Car Corporation, and the reasonableness of the allowance to be paid by carriers by railroad for the use of tank cars furnished such carriers by the El Dorado Oil Works for the transportation of its products in interstate commerce during the period from January 1, 1934, to December 31, 1936;

It further appearing, That a full investigation of the matters and things involved has been had, and that the parties have been fully heard, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the proceeding be, and it is hereby, discontinued."

Said order contains no word of command, and requires neither the plaintiffs herein nor any other party to do or to refrain from doing anything. It simply discontinues said proceeding.

On June 16, 1944, the Oil Works and the Terminal Company filed a petition for rehearing, reargument and re-

consideration. Replies thereto were filed by the General American Transportation Corporation and the respondent carriers. By order dated July 31, 1944, the Commission denied said petition.

VI.

Answering paragraph VI of the complaint, the Commission respectfully refers the Court to the report of April 10, 1944, for full, accurate and complete information as to its contents.

VII

The Commission denies each of and all the allegations in paragraph VII of the complaint, and alleges that the findings, determinations and conclusions of fact contained in said report of April 10, 1944, were and are, and that each of them was and is, fully supported by the evidence.

[fol. 32] VIII

Answering paragraph VIII of the complaint, the Commission denies that said order of the Commission will cause irreparable injury or damage to plaintiffs, and denies each of and all other allegations in said paragraph VIII.

IX

Further and affirmatively answering the complaint, the Commission respectfully alleges that the relief sought should be denied for the following reasons:

(a) The subject matter of the complaint is an order of the Commission which requires neither the doing, nor the abstaining from doing, of any act by plaintiffs.

(b) Said order is not a n order within the meaning of the Urgent Deficiencies Act or any other act authorizing suits in the district courts of the United States to enjoin, set aside, annul, or suspend orders of the Commission.

(c) The complaint does not contain either statements or allegations of fact which show that said order of the Commission causes plaintiffs, or will cause plaintiffs, such legal injury, or threatened legal injury, as entitles them to maintain this suit.

(d) The report, referred to in and made a part of the order, does nothing more than to make certain administra-

tive findings upon certain questions involved in a suit at law now pending before this Court, regularly constituted as a District Court of one judge, in which plaintiffs seek to recover certain sums of money. Said report, in which the Commission merely makes certain administrative findings upon questions which arose in the suit at law for the recovery of money now pending before this Court as a regularly constituted District Court of one judge, is not an order reviewable in this Court when specially constituted of three [fols. 38-71] judges, one a circuit judge, under the provisions of the Urgent Deficiencies Act, from whose judgment a direct appeal would lie to the Supreme Court of the United States.

(e) Plaintiffs have a full, adequate and complete remedy at law.

(f) Plaintiffs' complaint fails to meet the requisites of equity and fails to state a cause of action cognizable in equity.

All of which matters and things the Commission is ready to aver, maintain and prove, and hereby prays that said complaint be dismissed.

Interstate Commerce Commission, By J. Stanley Payne, Assistant Chief Counsel, Daniel W. Knowlton, Chief Counsel, of Counsel.

Duly sworn to by Clyde B. Aitchison, jurat omitted in printing.

[fol. 72] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE UNITED STATES—Filed October 23, 1944

Now comes the United States of America, defendant herein, and in answer to the complaint says:

First Defense

1. As a first defense to the complaint and in answer to paragraph 3 thereof, denies that this Court as constituted under the Urgent Deficiencies Act of October 22, 1913, has jurisdiction of this suit.

A. Defendant further alleges that in order to understand this question it is necessary to consider the history of this litigation, which is as follows:

In June 1935, the El Dorado Terminal Company (hereinafter called the Terminal Compay), as assignee of the El Dorado Oil Works (hereinafter called the Oil Works), brought in this Court (i.e. a single-judge district court), an action in assumpsit against the General American Tank Car Corporation to recover a sum alleged to be due it by the Car Corporation under the terms of a certain car leasing agreement. This sum consisted of amounts paid by rail-carriers to the Car Corporation as allowances for the use of tank cars, owned by the latter and leased to the Terminal Company for shipment of its products. This Court ren- [fol. 73] dered judgment for the Car Corporation. The judgment was reversed by the Circuit Court of Appeals, which held that the Terminal Company was entitled to the full amount claimed, 104 F. (2d) 903, 916. The Supreme Court granted certiorari and in its opinion, rendered January 2, 1940, *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, it held that the suit was within the jurisdiction of this Court, since the action was an ordinary one in assumpsit on a written contract, and that the Court had jurisdiction of the parties, but it further held that the case involved an administrative question subjected by the Interstate Commerce Act to the administrative authority of the Commission and that, when it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the Court should have stayed its hand pending the Commission's determination of this administrative problem, namely, the lawfulness and the reasonableness of the practices of the parties under the terms of the Interstate Commerce Act. The Supreme Court further held that there should not be a dismissal, but that the cause should be held pending the conclusion of an appropriate administrative proceeding. Accordingly, the judgment of the Circuit Court of Appeals was reversed and the cause remanded to this Court for further proceedings in conformity to the opinion. This cause is now pending in this Court.

Thereafter, the Oil Works and the Terminal Company filed a petition with the Commission, on June 7, 1940, citing the Supreme Court's opinion in the above-cited case, and

requesting that the Commission determine the administrative questions involved in the aforesaid litigation.

By order dated July 24, 1940, the Commission instituted an investigation to determine said administrative questions, naming as respondents a large number of common carriers by railroad engaged in the transportation of coconut oil from California points to various points in the United States.

[fol. 74] The matter was assigned for hearing and heard before an examiner of the Commission at San Francisco, California, December 9 and 10, 1940. The Oil Works and the Terminal Company, by their counsel, and the respondent carriers, by their counsel, appeared and participated therein. The General American Transportation Corporation, successor in interest to the General American Tank Car Corporation, by its counsel, also appeared at the hearing, there presented a petition for leave to intervene, which was granted, and participated in the hearing. Substantial evidence was submitted by the respective parties, the typewritten transcript of the testimony filling 271 typewritten pages, which was supplemented by eight physical exhibits (samples of oil) and two documentary exhibits.

Following written and oral argument the Commission issued its report as aforesaid, containing its findings, determinations and conclusions upon the administrative questions presented to it. With the report the Commission issued an order which reads as follows:

> *It appearing*, That by order dated July 24, 1940, the Commission, in response to a joint petition filed by El Dorado Oil Works and El Dorado Terminal Company, instituted an investigation to determine the lawfulness of the practices under the terms of a contract dated September 28, 1933, between the El Dorado Oil Works and the General American Tank Car Corporation, and the reasonableness of the allowance to be paid by carriers by railroad for the use of tank cars furnished such carriers by the El Dorado Oil Works for the transportation of its products in interstate commerce during the period from January 1, 1934, to December 31, 1936:
>
> *It further appearing*, That a full investigation of the matters and things involved has been had, and that the parties have been fully heard, and that the Commission,

on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the proceeding be, and it is hereby, discontinued.

B. More particularly, defendant alleges that jurisdiction does not exist here because the conventional requisites of equity jurisdiction, which are also requisites for jurisdiction under the Urgent Deficiencies Act, are not established. [fol. 75] Specifically, it alleges that such requisites of equity jurisdiction do not exist because the present report and order of the Commission do not constitute a clear and immediate threat of interference with plaintiffs' legal rights and because plaintiffs have an adequate legal remedy to review the Commission's action. The present report and order of the Commission do nothing more than to make certain administrative findings upon certain questions involved in the aforementioned suit at law pending before a single-judge court in this district. The Commission's determination is merely ancillary to that suit. It can directly affect plaintiffs' rights only upon the contingency of further judicial action, namely the approval and adoption of the Commission's findings by the single-judge district court. Furthermore, defendant alleges that plaintiff will have an adequate opportunity to review the Commission's action in such suit at law.

Second Defense

1. Admits the allegations of paragraphs I and II of the complaint.

2. Admits the allegations of paragraphs III and IV, except denies, for the reasons indicated in the First Defense, that this Court has jurisdiction.

3. Admits the allegations of paragraph V.

4. Admits the allegations of paragraph VI to the extent that they are consistent with the findings and conclusions in the report and order of the Commission, to which the Court is referred for a more complete statement concerning the matters referred to in this paragraph.

5. Denies the allegations of paragraphs VII and VIII of the complaint.

Wherefore: It is respectfully prayed that the complaint be dismissed.

Robert L. Pierce, Special Assistant to the Attorney General. Department of Justice, Washington, D. C. Attorney for the United States of America, defendant.

[fol. 76] Wendell Berge, Assistant Attorney General. Frank J. Hennessy, United States Attorney. William E. Licking, Asst. United States Attorney.

Certificate of Service

I hereby certify that I served a copy of the above answer upon each of the following counsel this 14th day of October, 1944, by mailing them a copy thereof:

W. F. Williamson, Esquire, Williamson & Wallace, 310 Sansome Street, San Francisco 4, California.

Daniel W. Knowlton, Esquire, Chief Counsel, Interstate Commerce Commission, Washington 25, D. C.

Allan P. Matthew, Esquire, 1500 Balfour Building, San Francisco 4, California.

Douglas F. Smith, Esquire, 11 South LaSalle Street, Chicago, Illinois.

J. Carter Fort, Esquire, General Counsel, Association of American Railroads, Transportation Building, Washington, D. C.

Robert L. Pierce, Special Assistant to the Attorney General.

[File endorsement omitted.]

[fol. 77] In United States District Court

[Title omitted]

Motion for Leave to Intervene as a Defendant—Filed October 30, 1944

Applicant, General American Transportation Corporation, a corporation, moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in its proposed answer, of which a copy is [fol. 78] hereto attached, upon the grounds that applicant was a party in interest, to wit, an intervener,

to the proceeding before the Interstate Commerce Commission referred to in the complaint herein and particularly in paragraphs III to VIII thereof, entitled: "In the Matter of the Petition of El Dorado Oil Works and El Dorado Terminal Company for Investigation of Mileage Allowances by Interstate Carriers for the Use of Tank Cars of Private Ownership", Docket No. 28515. In said proceeding the Interstate Commerce Commission made its order, a copy of which is attached to the complaint herein as a part of "Exhibit A", and which order the plaintiffs pray by their complaint herein to have declared null and void. As appears from the report and order of the Interstate Commerce Commission in said proceeding, the interests of applicant are involved in this action. By reason of the premises, applicant has an unconditional right to intervene herein under the provisions of U. S. C. A. Title 28, Section 45a, and makes this motion for leave to intervene as of right.

W. S. Hefferan, Jr., 135 South LaSalle Street, Chicago 90, Illinois; Kenneth F. Burgess, Douglas F. Smith, 11 South LaSalle Street, Chicago 3, Illinois; Allan P. Matthew, Burnham Enerson, 1500 Balfour Building, San Francisco 4, California, Attorneys for General American Transportation Corporation, Applicant for Intervention.

Sidley, Austin, Burgess & Harper, 11 South LaSalle Street, Chicago 3, Illinois; McCutchen, Thomas, Matthew, Griffiths & Greene, 1500 Balfour Building, San Francisco 4, California, of Counsel.

[fol. 79] NOTICE OF MOTION

To: Willard F. Williamson and Williamson & Wallace, 310 Sansome Street, San Francisco 4, California, Attorneys for Plaintiffs; Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorney for Interstate Commerce Commission, Intervening Defendant; Robert L. Pierce, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.; Wendell Berge, Assistant Attorney General, Department of Justice, Washington, D. C.; Frank J. Hennessy, United States Attorney, Postoffice Building, Seventh and Mission Streets, San Francisco, California, Attorneys for Defendant, the United States of America.

Please Take Notice that the undersigned will bring the above motion on for hearing before this Court, in the courtroom of the Honorable Louis E. Goodman, in the United States Postoffice Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, on the 6th day of November, 1944, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated at San Francisco, California, October 30, 1944.

W. S. Hefferan, Jr., 135 South LaSalle Street, Chicago 90, Illinois; Kenneth F. Burgess, Douglas F. Smith, 11 South LaSalle Street, Chicago 3, Illinois; Allan P. Matthew, Burnham Enerson, 1500 Balfour Building, San Francisco 4, California, Attorneys for General American Transportation Corporation, Applicant for Intervention.

Sidley, Austin, Burgess & Harper, 11 South LaSalle Street, Chicago 3, Illinois; McCutchen, Thomas, Matthew, Griffiths & Green, 1500 Balfour Building, San Francisco 4, California, of Counsel.

[fol. 80] (Here follows *Answer of General American Transportation Corporation, Intervening Defendant*—copied hereafter).

[fol. 81] Service of the within Motion, Notice of Motion and Proposed Answer and receipt of a copy is hereby admitted this 30th day of Oct. 1944.

Willard E. Williamson, Williamson & Wallace, Attorneys for Plaintiff.

Service of the within Motion, Notice of Motion and Proposed Answer and receipt of a copy is hereby admitted this 30th day of Oct. 1944.

Frank J. Hennessy, Attorney for Defendant.

[fol. 82] In United States District Court

[Title omitted]

Affidavit of Service by Mailing—Filed October 30, 1944

State of California,
City and County of San Francisco, ss:

Joseph E. Scanlon, being first duly sworn, deposes and says:

[fols. 83-84] That he is a citizen of the United States, over the age of eighteen years, and not a party to nor interested in the above entitled action. That his business address is 1406 Balfour Building, San Francisco, California, and that he is a resident of the City and County of San Francisco, State of California.

That on the 30th day of October, 1944, he served the foregoing Motion to Intervene as a Defendant, Notice of Motion, as aforesaid, and proposed Answer upon Robert L. Pierce, Special Assistant to the Attorney General, and Wendell Berge, Assistant Attorney General, attorneys for defendant, the United States of America, and Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, attorney for intervening defendant, in the following manner: That on the 30th day of October, 1944, he enclosed a full, true and correct copy of said Motion to Intervene as a Defendant, Notice of Motion and proposed Answer in a sealed envelope, with the postage thereon fully prepaid, addressed to each of the following, to wit:

> Robert L. Pierce, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.; Wendell Berge, Assistant Attorney General, Department of Justice, Washington, D. C.; Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, Washington 25, D. C.

and deposited said envelopes in the United States postoffice at San Francisco, California. That there is a regular communication by mail between the place of mailing and the place addressed, as aforesaid.

Joseph E. Scanlon.

Subscribed and sworn to before me this 30 day of October, 1944. Edith Via, Notary Public, in and for the City and County of San Francisco, State of California. (Notarial Seal.)

[File endorsement omitted.]

[fols. 85-87] IN UNITED STATES DISTRICT COURT

[Title omitted]

[fol. 88] MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS
Filed October 31, 1944

Applicants, The Alabama Great Southern Railroad Company, a corporation, et al., move for leave to intervene as defendants in this action, in order to assert the defenses set forth in their proposed answer, of which a copy is hereto attached, upon the grounds that applicants were parties in interest, to wit, respondents, in the proceeding before the Interstate Commerce Commission referred to in the complaint herein and particularly in paragraphs III to VIII thereof, entitled "In the Matter of the Petition of El Dorado Oil Works and El Dorado Terminal Company for Investigation of Mileage Allowances by Interstate Carriers for the Use of Tank Cars of Private Ownership", Docket No. 28545. In said proceeding the Interstate Commerce Commission made its order, a copy of which is attached to the complaint herein as a part of "Exhibit A", and which [fol. 89] order the plaintiffs pray by their complaint herein to have declared null and void. As appears from the report and order of the Interstate Commerce Commission in said proceeding, the interests of applicants are involved in this action. By reason of the premises, applicants have an unconditional right to intervene herein under the provisions of Section 45a, Title 28 United States Code, and make this motion for leave to intervene as of right.

Dated at San Francisco, California, October 31, 1944.

J. Carter Fort, Guernsey Orcutt, C. A. Miller, Charles Clark, J. E. Hennessy, R. F. Wedekind, R. S. Outlaw, Starr Thomas, Attorneys for Applicants for Intervention.

114 Sansome Street, San Francisco 4, California.

[fol. 90] NOTICE OF MOTION

To—

Willard F. Williamson and Williamson & Wallace, 310 Sansome Street, San Francisco 4, California, Attorneys for Plaintiffs;

Wendell Berge, Assistant Attorney General, Robert L. Pierce, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.;

Frank J. Hennessy, United States Attorney, Postoffice Building, Seventh and Mission Streets, San Francisco, Cal., Attorneys for defendant, the United States of America;

Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorney for Interstate Commerce Commission, intervening defendant.

Please Take Notice that the undersigned will bring the above motion on for hearing before this Court in the courtroom of the Honorable Louis E. Goodman, Postoffice Building, Seventh and Mission Streets, San Francisco, California, on the sixth day of November, 1944, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

J. Carter Fort, Guernsey Orcutt, C. W. Miller, [fol. 91] Charles Clark, J. E. Hennessy, R. E. Wedekind, R. S. Outlaw, Starr Thomas, Attorneys for Applicants for Intervention.

114 Sansome Street, San Francisco 4, California.

[fol. 92] AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Isabelle L. Lynch, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Alameda; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is: 114 Sansome Street, San Francisco 4, California; that on the 31st day of October, 1944, affiant served the within Motion to

Intervene as Defendants, Notice of Motion, and Proposed Answer of Intervening Defendants on the following parties in said action by placing a true copy thereof in an envelope addressed to the attorneys of record of each of them as follows:

To plaintiffs' attorneys: "Willard F. Williamson and Williamson & Wallace, 310 Sansome Street, San Francisco 4, California."

To the attorneys for the United States: "Wendell Berge, Assistant Attorney General, and Robert L. Pierce, Special Assistant to the Attorney General, Department of Justice, Washington, D. C." and "Frank J. Hennessy, United States Attorney, Postoffice Building, Seventh and Mission Streets, San Francisco, California."

To the attorney for the Interstate Commerce Commission: "Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, Washington 25, D. C." and by then sealing said envelopes and depositing the same, with postage fully prepaid, in the United States mail at San Francisco, California, where is located the office of the [fol. 93] attorneys for the persons by and for whom said service was made.

That there is delivery service by the United States mail at the places so addressed or there is a regular communication by mail between the place of mailing and the places so addressed.

Isabelle L. Lynch.

Subscribed and sworn to before me this 31st day of October, 1944. Emma L. MacHugh, Notary Public, in and for the City and County of San Francisco, State of California. My Commission Expires Jan. 17, 1948. (Seal of the Notary.)

[fol. 94] (Here follows Answer of the Alabama Great Southern Railroad Company, et al., Intervening Defendants—copied hereafter.)

[File endorsement omitted.]

[fol. 95] In United States District Court

[Title omitted]

Order Granting Motions for Leave to Intervene—November 6, 1944

This case came on regularly this day for hearing of motions to intervene as a defendant and motion to set for trial. W. B. Mead, Esq., attorney for plaintiff, and Wm. Licking, Esq., Assistant U. S. Attorney; R. E. Wedekind, Esq., and Allan P. Matthew, Esq., attorneys for certain intervenors, were present, and after hearing said attorneys it is Ordered that said motions to intervene be granted and that the case be set for trial for January 16, 1945.

[fol. 96] In United States District Court

[Title omitted]

Answer of General American Transportation Corporation, Intervening Defendant—Filed November 6, 1944

Now comes General American Transportation Corporation, intervening defendant, and, by leave of Court first had and obtained, files this its answer to plaintiffs' complaint [fol. 97] and admits, denies and alleges as follows:

I

Intervening defendant General American Transportation Corporation, hereinafter sometimes referred to as the "Transportation Corporation", is a corporation organized and existing under and by virtue of the laws of the State of New York, having its principal office in Chicago, Illinois, and is the owner of and is engaged in the business of furnishing various types of freight cars, including tank cars, for use in the transportation of property by railroad in interstate commerce.

II

The Transportation Corporation is the successor in interest to and has acquired all of the assets and assumed all of the liabilities of General American Tank Car Corporation, a corporation, hereinafter referred to as the "Car

Corporation"; among the assets and liabilities so acquired and assumed by the Transportation Corporation are the rights and obligations of the Car Corporation under a lease agreement dated September 28, 1933, with plaintiff El Dorado Oil Works, which agreement is referred to in the complaint herein and a true copy whereof is attached to the complaint as a part of "Exhibit A" thereto.

III

This intervener admits the allegations of Paragraphs I and II of the complaint.

IV

Answering Paragraph III of the complaint, this intervener admits that this action purports to be brought under the provisions of the Urgent Deficiencies Act of October 22, 1913 (39 Stat. 219; 28 U. S. C., sec. 41(27) and (28) and secs. 43-48), but this intervener alleges that the order of the [fol. 98] Interstate Commerce Commission sought to be set aside by the complaint herein is not an order which may be enjoined, set aside, annulled or suspended by this Court.

V

Answering Paragraph IV of the complaint, this intervener admits that on April 10, 1944, the Interstate Commerce Commission made a report and order in a proceeding entitled "*Allowances for Privately-Owned Tank Cars*", a copy of which report and order is attached to the complaint herein as "Exhibit A".

VI

Answering Paragraph V of the complaint, this intervener admits that on June 16, 1944, plaintiffs filed with the Commission an application, dated June 7, 1944, for the Rehearing, Reargument and Reconsideration of said order of the Commission made on April 10, 1944, and that thereafter the said application was denied by the Commission.

Further answering Paragraph V of the complaint, this intervener admits and alleges: On June 19, 1935, plaintiff El Dorado Terminal Company, as the assignee of plaintiff El Dorado Oil Works, brought an action against the Car Corporation in this Court to recover certain sums alleged to be due under said lease agreement of September 28, 1933, hereinbefore referred to, as the balance of mileage

allowances for the use of tank cars, owned by the Car Corporation and leased to the El Dorado Oil Works, during the period from January 1, 1934, to May 31, 1935, inclusive; in its defense to said action the Car Corporation pleaded, inter alia, as follows:

> "That defendant has credited said El Dorado Oil Works and the plaintiff with all of the mileage earnings [fol. 99] in the complaint and in the said agreement referred to in an amount or amounts equal to the car hire or rental reserved in said agreement; that the defendant has refused, and still refuses to credit either the El Dorado Oil Works or the plaintiff with any mileage earnings in excess of said car hire or rental reserved in said agreement for the reason that defendant was and is expressly prohibited and enjoined therefrom by law and particularly by the provisions of that certain statute of the United States of America entitled 'An Act to further regulate commerce with foreign nations and among the states' (32 Stat. L. 847, 34 Stat. L. 584; U. S. Code Title 49, Sec. 41), commonly known as the Elkins Act. In this behalf defendant avers that the said tank cars leased by defendant to the said El Dorado Oil Works as in said agreement provided were used during the times specified in the complaint in the transportation of property of the said El Dorado Oil Works over the lines of railway of common carriers subject to the said Elkins Act, and that such transportation was almost entirely in interstate or foreign commerce. That under the terms of the tariffs of such common carriers published and filed with the Interstate Commerce Commission in the manner required by law certain mileage payments were and are made by the carriers for the use of privately owned cars employed in the transportation of property over the lines of railway of such common carriers, according as their respective lines of railway may run. That if defendant were to credit or to pay over to the plaintiff or to said El Dorado Oil Works any part of the mile- [fol. 100] age payments received from said common carriers by defendant, as the owner of said cars, in excess of the car hire or rental reserved in said agreement, such credit and payment would be unlawful in that plaintiff or said El Dorado Oil Works would secure

the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act";

this Court rendered judgment in said action for the Car Corporation but said judgment was thereafter reversed by the United States Circuit Court of Appeals for the Ninth Circuit; thereafter the Supreme Court of the United States granted certiorari in said action and by its decision rendered on January 2, 1940, in *General American Tank Car Corporation v. El Dorado Terminal Company*, 308 U. S. 422, it held that the action involved an administrative question subjected by the Interstate Commerce Act to the administrative authority of the Commission, and that, when it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the Court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act; the Supreme Court held further that there should not be a dismissal of the action but that the cause should be held pending the conclusion of an appropriate administrative proceeding; the judgment of the Circuit Court of Appeals was reversed and the cause remanded to this Court for further proceedings in conformity to the opinion; said cause is now pending in this Court.

[fol. 101] Thereafter, on June 7, 1940, plaintiffs herein filed a petition with the Commission citing the opinion of the Supreme Court rendered on January 2, 1940, as aforesaid, and requesting that the Commission determine the administrative questions involved in said litigation; a copy of said petition, omitting only the agreement referred to therein, is attached to the answer of the intervening defendant Interstate Commerce Commission herein, marked "Exhibit No. 2"; by its order dated July 24, 1940, the Commission instituted a proceeding of investigation to determine said administrative questions, naming as respondents a large number of common carriers by railroad; a copy of the Commission's said order is attached to the answer of the intervening defendant Interstate Commerce Commission herein, marked "Exhibit No. 3";

a hearing in said proceeding was held before an Examiner of the Commission, in December, 1940, and the plaintiffs herein, by their counsel, and the respondent carriers, by their counsel, appeared and participated therein; the Transportation Corporation was granted leave to intervene, and did intervene, in said proceeding and participated therein; after said hearing had been concluded the respective parties filed briefs and on May 14, 1941, the Examiner's proposed report was issued and served, to which exceptions were filed by the plaintiffs herein; on November 5, 1941, the proceeding was argued orally before the Commission at Washington, D. C.; on April 10, 1944, the Commission issued its report as aforesaid, containing its findings, determinations and conclusions upon the administrative questions presented to it; in its report the Commission found as follows:

"(1) That the rental paid or to be paid by El Dorado [fol. 102] Oil Works to General American Tank Car Corporation under the terms of the lease agreement between those parties, dated September 28, 1933, was the only cost incurred by the former in furnishing the tank cars in which its shipments moved. A just and reasonable allowance as a maximum to have been paid by the respondents, rail carrier or carriers, to the Oil Works for the furnishing of such cars would have been an amount not to exceed such rental. Such an amount and allowance has been paid to the Oil Works through credits made to the account of the Oil Works by the Tank Car Corporation.

(2) That an allowance to the Oil Works by the respondents, rail carrier or carriers, or by the Tank Car Corporation, under the agreement, in excess of said rental would be unjust and unreasonable, and would unduly prefer the Oil Works as a shipper of its commodities transported by it in the tank cars herein involved. The amount paid by the Tank Car Corporation to the Oil Works prior to July 1, 1934, under the terms of the agreement, to the extent it was in excess of the rentals due thereunder, was unjust and unreasonable, and unduly preferred the Oil Works as a shipper of its commodities.

(3) That the Oil Works is entitled to no allowance from the respondents, rail carrier or carriers, directly

or through the Tank Car Corporation, for the special cleaning and preparation of the tank cars during the period of the agreement, January 1, 1934, to December 31, 1936."

The Commission's order which followed and accompanied its report was as follows:

[fol. 103] "*It appearing*, That by order dated July 24, 1940, the Commission, in response to a joint petition filed by El Dorado Oil Works and El Dorado Terminal Company, instituted an investigation to determine the lawfulness of the practices under the terms of a contract dated September 28, 1933, between the El Dorado Oil Works and the General American Tank Car Corporation, and the reasonableness of the allowance to be paid by carriers by railroad for the use of tank cars furnished such carriers by the El Dorado Oil Works for the transportation of its products in interstate commerce during the period from January 1, 1934, to December 31, 1936;

"*It further appearing*, That a full investigation of the matters and things involved has been had, and that the parties have been fully heard, and that the Commission on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof.

"*It is ordered*, That the proceeding be, and it is hereby, discontinued."

Said order requires neither the plaintiffs herein nor any other party to do, or to refrain from doing, anything. Said order merely discontinues said proceeding.

VII

Answering Paragraph VI of the complaint, this intervener refers to the said report and order of the Interstate Commerce Commission dated April 10, 1944, for full, accurate and complete information as to its contents.

VIII

Answering Paragraph VII of the complaint this inter-
[fol. 104] vener denies that the said order of the Commission

is without foundation in law or that it is based upon errors of law; denies that it is not supported by evidence or by adequate findings; or is against the manifest weight of evidence; denies that it is confiscatory or exceeds the regulatory power of the Commission, or is arbitrary or void; denies that said order is not an order which the Commission is empowered to make under the provisions of the Interstate Commerce Act and alleges that said order is within the powers conferred upon the Commission by the Act, particularly as determined by the Supreme Court in its decision of January 2, 1940, hereinbefore referred to; denies that the Commission failed to grant plaintiffs a fair and adequate hearing; denies that the Commission failed to consider or give due weight to evidence introduced before it by plaintiffs; denies that said order or the findings of the Commission upon which it is based are without evidence to support them or that the Commission failed to make findings upon a material issue; denies that the Commission invaded or usurped the province of the civil courts; denies that the conclusions of the Commission were, or that any thereof was, erroneous in law; denies each and all of the other allegations in said Paragraph VII; alleges that the findings, determinations and conclusions of the Commission contained in its said report of April 10, 1944, were and are, and that each of them was and is, fully supported by the evidence, and that the said order of the Commission is in all respects valid.

IX

Answering Paragraph VIII of the complaint, this intervener denies that said order of the Commission will cause [fol. 105] irreparable or any injury or damage to plaintiffs, or either of them, and denies each of and all other allegations in said Paragraph VIII.

Wherefore this intervener prays that the complaint herein be dismissed.

W. S. Hefferan, Jr., 135 South LaSalle Street, Chicago 90, Illinois; Kenneth F. Burgess, Douglas F. Smith, 11 South LaSalle Street, Chicago 3, Illinois; Allan P. Matthew, Burnham Enersen, 1500 Balfour Building, San Francisco 4, California; Attorneys for General American Transportation Corporation, Intervening Defendant.

Sidley, Austin, Burgess & Harper, 11 South LaSalle Street, Chicago 3, Illinois; McCutchen, Thomas, Matthew, Griffiths & Greene, 1500 Balfour Building, San Francisco 4, California; of Counsel.

[fol. 106] State of California,
City and County of San Francisco, ss:

Allan P. Matthew, being first duly sworn, deposes and says:

That he is an attorney-at-law duly admitted to practice before all the courts of the State of California and before the District Court of the United States, in and for the Northern District of California; that he is one of the attorneys for the intervening defendant, General American Transportation Corporation, in the above entitled action, and as such attorney he makes this verification for and on behalf of said intervening defendant for the reason that said intervening defendant is not located within the State of California and none of its executive officers is located within the State of California. That he has read the foregoing answer of said intervening defendant and knows the contents thereof, and that the same is true of his knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

Allan P. Matthew.

Subscribed and sworn to before me this 6th day of November, 1944. Frank L. Owen, Notary Public, in and for the City and County of San Francisco, State of California. (Notarial Seal).

[File endorsement omitted.]

[fols. 107-109] In United States District Court

[Title omitted]

[fol. 110] Answer of the Alabama Great Southern Railroad Company, Et Al., Intervening Defendants—Filed November 24, 1944.

Come now The Alabama Great Southern Railroad Company, a corporation, et al., intervening defendants, last

above named, and by leave of Court, first had and obtained, file this, their answer to plaintiffs' complaint and admit, [fol. 111] deny, and allege as follows:

I

Said intervening defendants are common carriers engaged in the transportation of property by railroad between points in the United States. Each of said intervening defendants is a corporation except such as are specifically designated as trustees or receivers of certain corporations. Each such trustee or receiver is duly appointed, qualified and acting in such capacity under the authority of the United States District Court having jurisdiction in the premises.

II

Said interveners admit the allegations of paragraphs I and II of the complaint.

III

Answering paragraphs III and IV of the complaint, said interveners admit that this action purports to be brought under the provisions of the Urgent Deficiencies Act of October 29, 1913, (39 Stat. 219; 28 U. S. C. sec. 41(27) and (28) and secs. 43-48); but said interveners allege that the order of the Interstate Commerce Commission sought to be set aside by the complaint herein is one of a nature which is not reviewable under the provisions of the said Urgent Deficiencies Act.

IV

Said intervening defendants admit the allegations of paragraph V of the complaint.

V

Answering paragraph VI of the complaint, said intervening defendants refer to the said report and order [fol. 112] of the Interstate Commerce Commission dated April 10, 1944, for full, accurate and complete information as to its contents.

VI

Said intervening defendants deny each and all of the allegations in paragraph VII of the complaint.

VII

Answering paragraph VIII of the complaint, said intervening defendants deny that said order of the Interstate Commerce Commission will cause irreparable or any injury or damage to plaintiffs, or either of them, and deny each and all of the other allegations in said paragraph VIII.

Wherefore said intervening defendants pray that the complaint herein be dismissed.

J. Carter Fort, Guernsey Orcutt, C. A. Miller, Charles Clark, J. E. Hennessy, R. E. Wedekind, R. S. Outlaw, Starr Thomas, Attorneys for Intervening Defendants, 114 Sansome Street, San Francisco 4, California.

[fol. 113] State of California,
City and County of San Francisco, ss:

Isabelle L. Lynch, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Alameda; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is: 114 Sansome Street, San Francisco 4, California; that on the 20th day of November, 1944, affiant served the within Answer of Intervening Defendants on the following parties in said action by placing a true copy thereof in an envelope addressed to the attorneys of record of each of them as follows:

To plaintiffs' attorneys: "Willard E. Williamson and Williamson & Wallace, 310 Sansome Street, San Francisco 4, California."

To the attorneys for the United States: "Wendell Berge, Assistant Attorney General, and Robert L. Pierce, Special Assistant to the Attorney General, Department of Justice, Washington, D. C." and "Frank J. Hennessy, United States Attorney, Postoffice Building, Seventh and Mission Streets, San Francisco, California."

To the attorney for the Interstate Commerce Commission: "Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, Washington 25, D. C."

and by then sealing said envelopes and depositing the same, with postage fully prepaid, in the United States mail at San Francisco, California, where is located the office of the attorneys for the persons by and for whom said service [fol. 114] was made.

That there is delivery service by the United States mail at the places so addressed or there is a regular communication by mail between the place of mailing and the places so addressed.

Isabelle L. Lynch.

Subscribed and sworn to before me this 20th day of November, 1944. Emma L. MacHugh, Notary Public, In and for the City and County of San Francisco, State of California. My Commission expires Jan. 15, 1948. (Seal of the Notary)

[File endorsement omitted.]

[fol. 115] In the United States District Court for the Northern District of California

Civil Action No. 23619-G

El Dorado Oil Works, a Corporation, and El Dorado Terminal Company, a Corporation, Plaintiff,

vs.

United States of America, Defendant,

and

Interstate Commerce Commission, Intervening Defendant

Order Dismissing Action—Filed March 7, 1945

Ordered:

1. The above entitled action is hereby dismissed with costs to defendant and intervenors.

2. Counsel for defendant may submit Findings of Fact and Conclusions of law in conformity with Rule 52-A F. R. C. P.

Opinion filed.

Dated: March 6th, 1945.

Curtis D. Wilbur, United States Circuit Judge; Louis E. Goodman, United States District Judge; A. F. St. Sure, United States District Judge.

[File endorsement omitted.]

[fol. 116] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. 23619-G

EL DORADO OIL WORKS, a Corporation, and EL DORADO TERMINAL COMPANY, a Corporation, Plaintiffs,

vs.

UNITED STATES OF AMERICA, Defendant,

and

INTERSTATE COMMERCE COMMISSION, Intervening Defendant

W. F. Williamson, Williamson & Wallace, 310 Sansome Street, San Francisco, California, Attorneys for Plaintiff.

Robert L. Pierce, Special Assistant to the Attorney General, Washington, D. C.; Frank J. Hennessy, United States Attorney, San Francisco, California, Attorneys for Defendant.

[fol. 117] Daniel W. Knowlton, Washington, D. C.; Attorney for Intervenor Interstate Commerce Commission.

W. S. Hefferan, Jr., Kenneth F. Burgess, Douglas F. Smith, Chicago, Illinois; Allan P. Matthew, Burnham Enersen, Balfour Building, San Francisco, California; Attorneys for General American Transportation Corporation, Intervenor.

J. Carter Fort, Guernsey Orcutt, C. A. Miller, Charles Clark, J. E. Hennessy, R. E. Wedekind, R. S. Outlaw, Starr Thomas, 114 Sansome Street, San Francisco, California; Attorneys for The Alabama Great Southern Railroad Company, et al. Intervenors.

Before Honorable Curtis D. Wilbur, United States Circuit Judge; Honorable A. F. St. Sure, United States District Judge; Honorable Louis E. Goodman, United States District Judge.

GOODMAN, District Judge:

OPINION—Filed March 7, 1945

Plaintiff's bill of complaint, by which this three judge court is asked to annul and vacate a decision of the Inter-

state Commerce Commission, culminates a long process of litigation.

In 1933, plaintiff, a processor of cocoanut oil, contracted with General American Transportation Corporation, owner of private tank cars, to rent a fixed number of the latter's tank cars at a stipulated monthly sum per car. By the agreement, the tank car company agreed to pay over to plaintiff the excess, if any, of the mileage income it re- [fol. 118] ceived from railroad carriers over and above the stipulated monthly rental to be paid to it by plaintiff.

This agreement the tank car company performed until the following years, when the Interstate Commerce Commission, in a proceeding pending before it involving refrigerator cars, ruled payments of this kind to be improper. (Use of Privately Owned Refrigerator Cars, 201 I. C. C. 323-378.) Thereafter the tank car company refused to make any further such payments to plaintiff. Thereupon the plaintiff filed an action in assumpsit in this court to recover the sum of $18,532.78 alleged to be the amount of the accumulated payments due it. Judgment in favor of the defendant in that case was reversed by the Circuit Court of Appeals (104 Fed. (2d) 903, 9th Cir.).

The Supreme Court took over the cause on certiorari and reversed the Circuit Court of Appeals (General American Tank Car Corp. v. El Dorado Terminal Co. 308 U. S. 422) holding that the District Court should have stayed proceedings "when it appeared in the course of the litigation that an administrative problem committed to the Commission, was involved" and "should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act." (i.e. Interstate Commerce Act.)

In so holding, the Supreme Court followed a like procedure which it earlier had invoked in Mitchell Coal & Coke Co. v. Penna. R. R. Co. 230 U. S. 247.

Thereafter, following a petition filed with the Interstate Commerce Commission by the plaintiff, the Commission instituted and conducted an investigation upon the subject matter of the practice followed by plaintiff and the tank car company pursuant to the agreement between them. [fol. 119] After hearings, in which the plaintiff, the tank car company and numerous railroad carriers participated, the Commission made a determination whereby it decided in

effect that the car rental paid by the plaintiff to the tank car company represented the plaintiff's only cost in furnishing the tank cars in which its (plaintiff's) shipments moved, and that any allowances, by the tank car company to the plaintiff pursuant to the agreement between them in excess thereof, were unjust and unreasonable and constituted an unlawful preference or rebate to plaintiff as shipper, contrary to the Elkins Act. After making the finding and determination aforesaid the Commission discontinued the proceeding.

Plaintiff now seeks to have this three judge court vacate and annul the decision of the Interstate Commerce Commission, urging that the same is not supported by the evidence before the Commission. The cause was submitted upon a certified copy of the proceedings before the Interstate Commerce Commission.

Defendant and intervenors urge that the three judge court lacks jurisdiction of the subject matters and that, on the merits, the record supports the finding and decision of the Interstate Commerce Commission.

We do not pass upon the merits of the cause inasmuch as we are of the opinion that this court, as constituted pursuant to the "Urgent Deficiencies Act" (38 Stat. 219; 28 U. S. C. Sec. 41 (28); Sec. 43-48), lacks jurisdiction of the subject matter.

By the Urgent Deficiencies Act the jurisdiction conferred on three judge district courts is in "cases brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission." By its finding and determination with respect to the practices [fol. 120] here involved, the Interstate Commerce Commission made no decision which required any party to the proceeding before it to do or not to do any specific act. It followed the directions of the Supreme Court (General American Tank Car Corp. v. El Dorado Terminal Co., supra) and determined, under the Interstate Commerce Act, the lawfulness and reasonableness of the practice which had obtained between plaintiff and the tank car company. When this was done, its job was done. It was not required to make any order and made none, and having completed its work, stamped "finis" thereon and discontinued the proceeding. Hence there is no order, in the sense contemplated in the statute, requiring review by this

court. (U. S. v. Griffin, 303 U. S. 226, 233; U. S. v. Ill. Central R. R. Co. 244 U. S. 82; D. & H. Co. v. U. S. 266 U. S. 438; U. S. v. L. A. Ry. Co. 273 U. S. 299.)

Past transactions between plaintiff and defendant constitute the subject matter of the assumpsit action now pending in the District court. This is not a case of a presently existing practice declared unlawful by the Commission. Consequently there does not arise the right to apply for the equitable or injunctive relief provided by the statute to protect against irreparable damage.

The procedure specified by the Supreme Court in General American Tank Car Corp. v. El Dorado Terminal Co. supra, has been followed. The administrative practice involved has been passed upon by the Interstate Commerce Commission. The parties may now proceed in the assumpsit action. Therein, in our opinion, the court may determine plaintiff's cause and upon tender thereof, any competent defenses thereto.

The action will be dismissed with costs to defendant [fol. 121] and intervenors. Counsel for defendant may submit findings of fact and conclusions of law in conformity with Rule 52-A. F. R. C. P.

Dated: March 6, 1945.

[File endorsement omitted.]

[fol. 122] APPENDIX "C"

IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed April 9, 1945

The court makes the following findings of fact:

1. The El Dorado Oil Works is a California corporation engaged in crushing copra and extracting coconut oil therefrom in plants at Berkeley and Oakland, Calif., and shipping the product in tank cars in interstate commerce.

2. The El Dorado Terminal Company, a wholly owned subsidiary of the Oil Works Company, is also a California corporation, and during the times here involved it performed services for the Oil Works in the handling and shipping of its commodities.

[fol. 123] 3. The General American Tank Car Corporation, throughout the transactions hereinafter recited had its principal office at Chicago, Ill., and was the owner of numerous railway cars, including tank cars, which it furnished to various shippers for the transportation of their commodities. It was not affiliated with any railroad company by stock ownership or otherwise.

4. On September 28, 1933, the Oil Works entered into a written agreement with the Tank Car Corporation for the lease to the Oil Works during the period beginning January 1, 1934, and ending December 31, 1936, of 50 standard tank cars, referred to as permanent cars, at a rental of $27.50 per month, and for such further number of tank cars as the Oil Works should require at a rental of $30 per month, the Oil Works agreeing, insofar as it could lawfully do so, to use the Tank Car Corporation's cars exclusively. The agreement provided, among other things, that the Tank Car Corporation should collect from rail carriers all mileage earned by the leased cars while in the service of the Oil Works and each month should credit the entire earnings to the rental account of the Oil Works. Pursuant to this agreement the Tank Car Corporation assembled and delivered the tank cars to the Oil Corporation. The Oil Corporation loaded the cars and delivered them to the carriers for transportation. The Tank Car Corporation as the owner of the cars involved collected from the railroads rental for the use of the cars, based on an allow- [fol. 124] ance per mile for the distance for which they were used according to the tariffs filed by the railroads as required by law, but such tariffs did not provide for the payment of an allowance to the owner of the property transported from the plant of the Oil Works by reason of the furnishing of the tank cars therefor by the Oil Works as shipper-owner.

5. During the period from January 1 to July 1, 1934, the Tank Car Corporation paid over to the Oil Works mileage earnings of $7,219.54 in excess of the rental due from the Oil Works. After the latter date, assuming that such action would be necessary to comply with the principles enunciated by the Interstate Commerce Commission in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323, decided July 2, 1934, the Tank Car Corporation refused to pay over to the Oil Works any further excess mileage

earnings, notwithstanding the terms of the lease agreement.

6. In June 1935, the Terminal Company, as assignee of its parent company, the Oil Works, sued the Tank Car Corporation in the United States District for the Northern District of California to recover unpaid excess mileage earnings which had accrued from the use of the leased cars up to May 31, 1935. The amount sued for, according to evidence of record, was for the difference between the rentals credited by the Tank Car Corporation to the Oil Works and the total amount of mileage earnings of the leased cars received by the Tank Car Corporation from the [fol. 125] carriers, during the period from January 1, 1934, to May 31, 1935, and amounts to $23,540.79. Judgment for the Tank Car Corporation was rendered by the district court, but was reversed on appeal by the circuit court of appeals, 104 Fed. (2d) 903, 916, which held the Oil Company was entitled to the full amount claimed. The Supreme Court granted certiorari.

7. Subsequently, in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, the Supreme Court held that the "reasonableness and legality of the practices of the parties was subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission," and that "when it appeared in the course of the litigation that an administrative problem committed to the Commission was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act." The judgment of the circuit court of appeals was reversed and the cause remanded to the district court to be there held "pending the conclusion of an appropriate administrative proceeding" by the Commission.

8. There is also pending in the district court a second suit by the Oil Works for the recovery of unpaid excess mileage earnings which accrued between May 31, 1935, and the expiration of the contract, December 31, 1936.

9. Following the decision of the Supreme Court, the Oil Works and the Terminal Company on June 7, 1940, jointly petitioned the Interstate Commerce Commission to cause an [fol. 126] investigation to be made of the practices disclosed

by the action referred to and in the opinion of the United States Supreme Court. Upon consideration of that petition, by order dated July 24, 1940, the Interstate Commerce Commission instituted an investigation upon its own motion to determine:

(1) whether the practices involved under the terms and operations of the lease contract are unlawful in violation of the Interstate Commerce Act;

(2) whether a reasonable charge or allowance may be paid, and, if so, the amount thereof as a maximum to be paid, by the carrier or carriers by railroads for the use of the tank cars furnished such carriers by petitioners for the transportation of the products of petitioners in interstate commerce from Berkeley and Oakland, Calif., in the period January 1, 1934 to December 31, 1936; and

(3) what findings shall be made, or what rules, regulations, or practices shall be prescribed, or what orders shall be entered, to remove any unlawfulness that may be found to exist.

9. After hearing, in which the plaintiff, the tank car company, and numerous railroad carriers participated, the Commission made a determination whereby it decided in effect that the car rentals paid by the plaintiff to the tank car company represented the plaintiff's only cost in furnishing the tank cars in which its (plaintiff's) shipments moved, and that any allowances, by the tank car company to the plaintiff pursuant to the agreement between them in excess thereof, were unjust and unreasonable and constituted an unlawful preference or rebate to plaintiff as shipper, contrary to the Elkins Act. After making the finding and determination aforesaid the Commission discontinued the proceeding. (258 I. C. C. 371)

[fol. 127] 11. Plaintiff filed this bill in this court, consisting of three judges under the Urgent Deficiencies Act of October 22, 1913, seeking to have the court vacate and annul the decision of the Interstate Commerce Commission, urging that the same is not supported by the evidence before the Commission. The cause was submitted upon a certified copy of the proceedings before the Interstate Commerce Commission.

12. Defendant and intervenors urge that the three judge court lacks jurisdiction of the subject matter and that, on the merits, the record supports the finding and decision of the Interstate Commerce Commission.

The Court makes the following conclusion of law:

1. The court has no jurisdiction of this suit, as the only jurisdiction it has is to set aside an "order" of the Interstate Commerce Commission, and there is no order involved here.

2. The action is dismissed with costs to defendant and intervening defendants.

Dated: March 28th, 1945.

Curtis D. Wilbur, United States Circuit Judge;
A. F. St. Sure, United States District Judge;
Louis E. Goodman, United States District Judge.

(Endorsed) Lodged March 21, 1945. C. W. Calbreath, Clerk.

[File endorsement omitted.]

[fol. 128] In the United States District Court for the Northern District of California

Civil Action No. 23619-G

Eldorado Oil Works, a Corporation, and El Dorado Terminal Company, a Corporation, Plaintiffs,

vs.

United States of America, Defendant

and

Interstate Commerce Commission, Intervening Defendant

Final Decree—Filed April 9, 1945

This cause having come on to be heard on complaint, answers to complaint, and proofs, and having been argued by counsel before the specially-constituted District Court convened pursuant to the provisions of law, and there-

upon, upon consideration thereof, it was determined, ordered, adjudged and decreed as follows:

The relief prayed for in the complaint is hereby denied [fol. 129] and the complaint is dismissed at plaintiff's costs, for want of jurisdiction.

Curtis D. Wilbur, United States Circuit Judge;
A. F. St. Sure, United States District Judge;
Louis E. Goodman, United States District Judge.

March 28th, 1945.

(Endorsed) Lodged March 22, 1945. C. W. Calbreath, Clerk.

[File endorsement omitted.]

[fol. 130] In United States District Court

[Title omitted]

Petition for Appeal to the Supreme Court of the United States—Filed June 1, 1945

The above named plaintiffs, conceiving themselves aggrieved by the decree made and entered on the 28th day of April, 1945, in the above entitled cause, do hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith, and pray that this appeal may be allowed, and that a transcript of the record, pro- [fol 131] ceedings, and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

W. F. Williamson.

Williamson & Wallace, Attorneys for Plaintiffs.

Order Allowing Appeal

It Is Ordered that the appeal be allowed as prayed, this 1st day of June, 1945.

Louis E. Goodman, Judge of the United States District Court.

[File endorsement omitted.]

[fol. 132] In United States District Court

[Title omitted]

Assignment of Errors on Appeal from District Court to the Supreme Court of the United States—Filed June 1, 1945

The plaintiffs pray an appeal from the final decree of this court to the Supreme Court of the United States, and assign for error:

First. That the court erred in dismissing the complaint of plaintiffs for want of jurisdiction.

Second. That the court erred in denying the relief prayed for in the complaint of plaintiffs.

The plaintiffs pray that the decree denying the relief prayed for in the plaintiffs' complaint and dismissing the [fols. 133-149] said complaint be reversed and that the said District Court be ordered to enter a decree annulling and setting aside the order of the Interstate Commerce Commission as prayed for in plaintiffs' complaint.

W. F. Williamson,

Williamson & Wallace, Attorneys for Plaintiffs.

[File endorsement omitted.]

[fols. 150-175] Citation in usual form omitted in printing.

[fols. 176-180] In United States District Court

Order Extending Time to File Record Pursuant to Rule 11 of the Rules of the Supreme Court—Filed July 16, 1945

For Good Cause Shown the time to docket the above entitled case and to file the record thereof with the Clerk of the Supreme Court is hereby extended to and including the 29th day of August, 1945.

Dated: San Francisco, California, this 16th day of July, 1945.

Louis E. Goodman, Judge of the United States District Court.

[File endorsement omitted.]

[fols. 185-205] In United States District Court

[Title omitted]

Order Extending Time to File Record Pursuant to Rule 11 of the Rules of the Supreme Court—Filed August 23, 1945

For Good Cause Shown the time to docket the above entitled case and to file the record thereof with the Clerk of the Supreme Court is hereby extended to and including the 15th day of September, 1945.

Dated: San Francisco, California, this 23rd day of August, 1945.

Louis E. Goodman, Judge of the United States District Court.

[File endorsement omitted.]

[fol. 206] Clerk's Certificate to transcript omitted in printing.

[fol. 207] Plaintiffs' Exhibit No. 1

[fol. 208] Secretary's' Certificate to following papers omitted in printing.

Before the Interstate Commerce Commission

No. 28515

In the Matter of the Petition of El Dorado Oil Works and El Dorado Terminal Company, for Investigation of Mileage Allowances by Interstate Carriers for the Use of Tank Cars of Private Ownership.

Petition—June 7, 1940

The petition of El Dorado Oil Works and El Dorado Terminal Company respectfully shows:

1. That petitioner El Dorado Oil Works is a corporation organized under the laws of the State of California, with

its principal place of business in the City and County of San Francisco, in said State. Petitioner El Dorado Terminal Company is a wholly owned subsidiary of said oil works, and is also a corporation organized under the laws of said State, and employed by the said oil works in the operation of a wharf and terminal adjacent to the plant of the said oil works at the foot of Adeline Street in the City of Oakland in said State. Petitioner El Dorado Terminal Company, throughout the period covered by this petition also acted in behalf of said oil works in the loading and forwarding of coconut oil and other commodities manufactured and sold by the said oil works.

2. That ever since the year 1895 petitioner El Dorado Oil Works has been engaged in the business of crushing [fol. 209] copra at its plants in Berkeley or Oakland in the State of California, and extracting therefrom coconut oil and selling the same for edible and inedible purposes, and shipping the same to points in California and also in interstate Commerce. Almost universally said petitioner's sales of coconut oil have been made on the basis of prices f. o. b. cars at petitioner's plant in Oakland or Berkeley. While in some instances purchasers of petitioner's coconut oil have supplied steel tank cars for the transportation of said coconut oil from petitioner's plants to the point of consumption, with the growth and expansion of petitioner's business it became, and for upwards of twenty years has been, necessary that petitioner should have available for the transportation of its said coconut oil, tank cars in addition to those furnished by purchasers of such coconut oil equipped with heating coils and properly cleaned and conditioned for the transportation of such oil.

3. At no time since petitioners were incorporated and began business have the railroad carriers operating out of the San Francisco Bay Area and upon which petitioner was compelled to rely for transportation service, owned, possessed, controlled or utilized tank cars either adequate in number or properly equipped for the purpose of transporting the coconut oil manufactured by petitioner or similar commodities manufactured by others, nor have said railroads ever had a sufficient number of said tank cars available in any manner for use by petitioner or by other shippers of similar commodities. Throughout said period, [fol. 210] and at all times since 1917, the Transcontinental

Freight Bureau, Eastbound Tariff No. 3-G Item No. 404, Section 1, reads as follows:

"Rates provided for freight and tank cars do not obligate the carriers to furnish tank cars".

During all of said period petitioner El Dorado Oil Works has required, for the transportation of coconut oil manufactured and sold by it, the continuous use of from 50 to 70 cars of 8000 gallons capacity each, and equipped with heating coils, in addition to those possessed or owned by purchasers of petitioner's coconut oil and available for use in the transportation of their purchases.

Accordingly, and to meet its said requirement, petitioner has ever since 1918 leased or hired steel tank cars of the particular type required from the General American Tank Car Corporation, and has paid therefor a fixed monthly rental. In pursuance of this practice, and in anticipation of the approaching expiration of a similar contract, petitioner El Dorado Oil Works entered into an agreement with the General American Tank Car Corporation on the 28th day of September, 1933, under which the said tank car corporation leased to the petitioner and petitioner hired 50 coiled tank cars owned by said tank car corporation, each with an approximate capacity of 8,000 gallons, for an agreed monthly rental of $27.50 per car payable monthly in advance. A copy of said agreement is attached hereto as Exhibit "A" and is made a part of this petition. In and by said agreement petitioner also undertook to rent [fol. 211] and hire from the said tank car corporation and the said tank car corporation agreed to furnish all such additional cars as petitioner's business required during a period of three years commencing January 1, 1934, at an agreed car rental. It was further agreed in said car lease that the cars so leased by petitioner should bear the reporting marks of the tank car corporation or any other reporting marks which said tank car corporation might elect, and the said oil works also agreed to use all tank cars so furnished by the said tank car corporation exclusively for the transportation by the oil works of its products, and not to ship the said cars beyond the boundaries of the United States, Canada, or Mexico, without the written consent of the tank car corporation; also to protect and save the tank car corporation harmless from any loss or damage to persons or property arising from the use of said tank

cars and to pay to said tank car corporation the cost of repairing damage or replacing such car or cars if any, as might be damaged or destroyed while on any privately owned tracks, and also to replace any removable tank parts, dome lids, outlet caps, safety valves, etc., if lost or broken. In consideration of the said leasing by petitioner of said cars, and the payment of the said monthly rental therefor, the said tank car corporation in and by said lease agreed to collect all mileage earned by the cars covered by said agreement of lease, and to keep all records appertaining to their movements, and to credit and pay to the petitioner all mileage earned by said cars while in the service of petitioner, the said El Dorado Oil Works, according to and [fol. 212] subject to all rules of the tariffs of the railroads. Petitioner, El Dorado Oil Works also agreed in said lease so to use the said cars that the mileage under load should be equal to their mileage empty on each railroad over which they moved, and that should the empty mileage on any railroad exceed the loaded mileage over said road petitioner would immediately upon the expiration or termination of said agreement of lease pay to said tank car corporation for such excess, as so much additional rental or service charge, at the rate established by the tariff of the railroad on which such excess of empty mileage was incurred. Said agreement also provided that no lettering or marking of any kind should be placed upon said cars, or any of them by the said El Dorado Oil Works. No interstate railroad or other carrier was party to, or in any manner interested in, the making or performance of the said car lease agreement, and petitioners are informed and believe, and therefore aver, that no such carrier was cognizant of the making of the said agreement or of the terms or conditions thereof, or was in any manner affiliated or connected with either of the parties to said agreement.

5. The tank cars so leased were delivered into the possession of petitioner El Dorado Oil Works on or about the first day of January, 1934, and were thereafter in the sole possession of the said oil works, and used exclusively by it in the manner and for the purposes provided in the said agreement in the transportation of coconut oil manufactured [fol. 213] by said petitioner until on or about the first day of October, 1935, on which date, with the written consent of said tank car corporation the said agreement was assigned

by the said El Dorado Oil Works to its wholly owned subsidiary, petitioner El Dorado Terminal Company, and thereafter and until the expiration date of said contract, to-wit, December 31, 1936, the said tank cars were possessed and used by the said petitioner El Dorado Terminal Company, solely and exclusively in the service of said El Dorado Oil Works, and in the transportation of its coconut oil as provided in said agreement of lease.

6. Throughout the period covered by the said contract all of the railroad carriers over whose lines the said tank cars moved, had on file with the Interstate Commerce Commission, and there were duly published as required by law, fixed freight tariffs for the movement of said tank cars containing petitioner's coconut oil from petitioner's plants in Oakland and Berkeley, to the points of destination, and on every such movement of said cars throughout the entire period covered by the said contract, the full freight, so fixed and provided to be paid in the said tariffs, was so paid by the respective purchasers pursuant to the sales agreements between the oil works and said purchasers. Petitioners also aver that none of the said purchasers was a party to or in any manner interested in, or had any knowledge of, the said lease agreement of said cars or the mileage allowance paid or payable by the respective carriers for the use of said cars or any thereof, and neither the said tank car corpora- [fol. 214] tion nor anyone other than petitioners had any authority whatsoever in the routing of said cars; and generally petitioners caused said cars to be routed by the most direct and accepted route from the point of shipment to the points of destination.

7. Throughout the period covered by said contract and for many years prior thereto the interstate railroad carriers had on file with the Interstate Commerce Commission as required by pertinent Statutes and rules of the Commission, and there was published in the Mileage Tariffs of the American Railway Association Tariff Bureau, rules governing the payment of mileage for the use of tank cars of private ownership as follows:

"Payment of Mileage

"(a) Mileage for the use of cars of private ownership will be paid to the car owner or to the party who has acquired the car or cars, as shown by the perma-

nent reporting marks (see Note) for loaded and empty movement, provided cars are properly equipped and marked with the name of the owner or lessee and proper reporting marks or initials and car number.

"(b) Mileage will be paid to the car owner by other than the lessee on cars leased to or rented outright by a railroad company until the cars have been re-marked with the name and the proper reporting marks of the lessee railroad company.

"Note.—Acquirement or ownership will be identified by the permanent reporting marks painted or stenciled on the body of the car. When reporting mileage allowances, the carding, placarding or boarding of cars will not be recognized as evidencing their acquirement or ownership. To avoid confusion incidental to similarity of initials, car owners should obtain assigned reporting marks from the Transportation Division of the Ameri- [fol. 215] can Railway Association.".

Effective as of April 1, 1935, said filed and published rules for payment of mileage were changed to read as follows:

"Payment of Mileage

"(a) Mileage for the use of cars of private ownership will be paid for loaded and empty movements only to the car owner—not to a lessee—provided cars are properly equipped and marked with the assigned reporting marks and car number and provided, further, that the marked capacities and assigned reporting marks are properly published in the Official Railway Equipment Register I. C. C.—R. E. R. No. 241, issued by G. P. Conard, Agent, and the gallonage capacities in Freight Tariff 300, I. C. C. No. A2518, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof, except that the gallonage capacities of cars designed and used exclusively for handling of commodities on which weights and charges are arrived at by weight and not by gallonage capacity of cars, need not be published in Freight Tariff 300, I. C. C. No. A-2518, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof.

"(b) Reporting marks will be assigned to car owners, only, by the Secretary, Transportation Division, Association of American Railroads, upon written ap-

plication. Such marks may be used, also on cars operated but not owned by the party to whom the marks are assigned, and, when so used, such cars and the name and address of the owner, to whom the mileage will be paid, must be shown by the assignee in his registration in the Official Railway Equipment Register, I. C. C. R. E. R. No. 241, issued by G. P. Conard, Agent, supplements thereto or reissues thereof.

"(c) Assigned reporting marks must be painted or stenciled on the body of the car. When reporting mileage allowances, the carding placarding or boarding of cars will not be recognized."

Pursuant to the provisions of said rules for payment [fol. 216] of mileage allowances each of the several rail carriers over whose lines the said tank cars, so acquired by petitioners from said General American Tank Car Corporation, and furnished by petitioners to said railroads, moved in the transportation of petitioners' coconut oil, paid to said tank car corporation for the period from January 1, 1934 to May 31, 1935, the total sum of $51,403.58. Said sum was so paid by said carriers to the tank car corporation as the owner of said tank cars according to and as shown by the reporting marks on said cars, and was received and collected by the tank car corporation pursuant to the terms of said agreement with petitioners, and at the exact rate per mile so stated in the published rules for the payment of mileage allowances. Of the sums so received by it the tank car corporation paid to petitioners $32,870.80, being the exact amount paid by, or chargeable to, petitioners as rental for said cars for the period covered by said payments, but retained to its own use and ever since the month of May, 1935, has refused to pay to petitioner $18,532.78, being the balance of mileage payments received by the tank car corporation, notwithstanding the fact that under the terms of said car rental agreement of September 28, 1933, the tank car corporation was obligated to collect and pay to petitioners the whole of said sum of $18,532.78.

8. On June 19, 1935, petitioners brought suit against the tank car corporation to recover the said sum of $18,532.78. The tank car corporation admitted the contract, the correctness of the amount as claimed, and the receipt and

[fol. 217] retention thereof, but denied liability on the ground that the payment of said sum to petitioners as provided in said contract was expressly prohibited by the provisions of the Elkins Act, and that such payment by the tank car corporation would be unlawful in that petitioners would thereby obtain a rebate or concession in violation of the provisions of the Elkins Act. Thereafter, following a trial in the United States District Court for the Northern District of California, Southern Division, and appeal to the Circuit Court of Appeals for the Ninth Circuit, the case was heard by the Supreme Court of the United States on writ of certiorari. In an opinion delivered on January 2, 1940, and which is reported in 84 L. Ed. 266, the Supreme Court held that the District Court should not have proceeded to adjudicate the rights and liabilities of the parties in the civil action in the absence of a decision by this Commission with respect to the validity of the practice involved in the light of the provisions of the Interstate Commerce Act. Inter alia, the court also held that for many years car companies owned special types of freight cars, and in no manner affiliated with carriers, have been in the business of leasing cars to shippers. Of this practice the Court said:

> "The practice has been well known and well understood. It is entirely lawful, and the Commission has so held. But the practice cannot modify the requirements of paragraph (13) of Section 15, which governs the payment of allowances for private cars, and invests the Commission with authority to find and declare what allowances are reasonable."

[fol. 218] Further referring to the same subject, the Court also said:

> "The Commission is compelled to ascertain in the light of past and present experience, a fair and reasonable compensation to cover such costs and prescribe a uniform rate which will reflect such experience. It is inevitable that some shippers may be able to furnish facilities at less than the public allowance, while others may find their costs in excess of it. This fact, however, does not militate against the fixing of a uniform rate applicable to shippers properly classified by the Commission".

Briefly stated, the conclusions of the Court were that the carriers were bound by their rules to pay the mileage allowance to the tank car corporation as the owner shown by the permanent reporting marks; that the oil works had actually furnished the tank cars in question to the carriers for the transportation of petitioner's coconut oil and was entitled under the terms of Section (15) 13 of the Commerce Act "to be paid by the carrier a just and reasonable allowance for providing the facility"; and that no rule or regulation of the carriers may properly provide for the payment of such allowance to anyone other than the supplier of the cars—the present petitioners; but that the inquiry into the lawfulness of the practice is one peculiarly within the competence of the Commission; and finally that the cause "should be held in the District Court pending the conclusion of an appropriate administrative proceeding". As a result of the said decision of the Supreme Court the District Court and the Circuit Court of Appeals of the Ninth Circuit are barred from further action in the civil suit referred to, although, as declared by the Supreme [fol. 219] Court, the District Court has jurisdiction of the subject matter and of the parties, until action has been taken by the Interstate Commerce Commission under its administrative authority.

Wherefore, petitioners pray that the Commission cause an investigation to be made of the practices disclosed by the said action, and in the said opinion of the United States Supreme Court, and after such investigation and such hearing as the Commission may desire, the Commission enter its order holding that payment by the General American Tank Car Corporation to petitioners of the amounts so collected by said tank car corporation as mileage allowances for the use of the tank cars leased by petitioners and furnished by them to the railroad carriers may be made as provided in and for the entire period covered by the agreement of the parties dated September 28, 1933, without the violation of any provisions of the Elkins Act, and that the payments so made are reasonable and will not accomplish a rebate, concession or an advantage or discrimination in favor of either of the petitioners or in violation of the provisions of the Elkins Act, and that such other and further order or orders be made as the Commission may consider proper in the premises.

El Dorado Oil Works, By S. M. Haslett, Secy.; El Dorado Terminal Company, By S. M. Haslett, Secy., Petitioners, 311 California Street, San Francisco, Calif.

W. F. Williamson, Williamson & Wallace, Attorneys for Petitioners, Suite 1111, 310 Sansome Street, San Francisco, Calif.

[fol. 220] EXHIBIT "A" TO PETITION

This agreement made and entered into this 28th day of September, 1933, by and between General American Tank Car Corporation, a West Virginia corporation, First Party, and El Dorado Oil Works, a California corporation, Second Party:

Witnesseth

First: First Party does hereby lease and let unto Second Party, and Second Party does hereby rent and hire from First Party, fifty (50) tank cars (hereinafter sometimes called "Permanent Cars"), all of which Permanent Cars shall be coiled tank cars of an approximate capacity of eight thousand (8,000) gallons each. Said Permanent Cars shall bear the reporting marks of the First Party or any other reporting marks which the First Party may elect. Said Permanent Cars are now in the service of the Second Party under an agreement with the First Party which expires December 31, 1933, and possession of said cars under said agreement expiring December 31, 1933 shall be and it is hereby agreed to be delivery to the Second Party by the First Party of said Permanent Cars.

Second: All tank cars without compartments and non-insulated, of six thousand (6,000) gallon, eight thousand (8,000) gallon and ten thousand (10,000) gallon capacity, without coils, or with coils up to six (6) lines, are hereinafter referred to as "standard tank cars". First Party does hereby lease and let to the Second Party, and Second Party does hereby rent and hire from the First Party, Second Party's entire requirements of standard tank cars over and above said Permanent Cars. Such cars shall [fol. 221] bear the reporting marks of the First Party or any other reporting marks which the First Party may elect.

Such cars shall be delivered to the Second Party at points on San Francisco Bay, designated by the Second Party, within a reasonable time after request therefor, subject to all delays due to fires, strikes, accidents, railroad embargoes and congestions, and all other and like causes beyond the control of the First Party. All cars furnished hereunder, over and above said Permanent Cars shall not bear the name of the Second Party.

Second Party covenants and agrees, in so far as it may lawfully do so, that it will use the tank cars of the First Party exclusively, at all times during the term of this agreement, for the Second Party's entire requirements of standard tank cars, including all such requirements of Second Party's subsidiaries and other corporations as hereinafter specified, and that it will not use any standard tank cars of others during said term, provided First Party's standard tank cars are available for loading at the time, upon reasonable notice, and if not so available, Second Party shall have the right to use the standard tank cars of others for the period during which the First Party's tank cars are not so available. The term: "entire requirements of standard tank cars" wherever used in this agreement is intended to mean, and shall be construed as meaning the number of standard tank cars needed by the Second Party during the term of this agreement, over and above said Permanent Cars, for the transportation of the products of the Second Party, it being understood that the Second Party does and may, in its discretion, use means of [fol. 222] transportation of the products of the Second Party, other than by rail, but that no other means of transportation shall be used or employed by the Second Party to the complete exclusion of transportation by rail in standard tank cars. A particular tank car furnished by First Party to the Second Party hereunder, over and above said Permanent Cars, shall be considered as leased to the Second Party when made available by First Party to Second Party upon reasonable notice, at points on San Francisco Bay, designated by Second Party, and shall continue to remain in the service of the Second Party until returned to the First Party at Berkeley, California, or Oakland, California, as Second Party shall determine.

The term: "Second Party" as used herein shall include the El Dorado Oil Works and all existing and future subsidiary companies of El Dorado Oil Works and corpora-

MICRO CARD
TRADE MARK ®
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MATTHEW BENDER & COMPANY
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tions controlled, operated or managed by El Dorado Oil Works.

Third: Second Party agrees to use all the tank cars furnished hereunder exclusively in its service for the transportation of its products, which products will not injure or affect the tanks, and agrees that said cars shall not be shipped beyond the boundaries of the United States, Canada or Mexico, without the written consent of the First Party. Second Party further agrees to pay to the First Party for the use of the Permanent Cars the sum of Twenty seven and 50/100 Dollars ($27.50) per car per month, and for the use of the tank cars furnished hereunder, over and above said Permanent Cars, at the rate of Thirty Dollars ($30) per car per month, for the time [fol. 223] such cars are in the service of the Second Party. Said payments shall be made to the First Party at its office 940 Continental Illinois Bank Building, Chicago, Illinois. Payment of the rental on said Permanent Cars shall be made on the first day of each month in advance, without deduction, except as set forth in paragraph Sixth hereinafter.

(OK General Amer. Tank Car Corpn., R. T. Musser.)

Payment of the rental on the tank cars furnished by the First Party to the Second Party hereunder, over and above said Permanent Cars, shall be made on the fifth (5) day of each month, immediately following any month during which any of said cars have been in the service of the Second Party.

Fourth: This agreement is to remain in full force and effect for a period of three (3) years beginning January 1, 1934 and ending December 31, 1936. Second Party shall have the right to extend the term of this agreement for an additional period of two (2) years, that is to say, until December 31, 1938, provided that it shall give to the First Party notice in writing of its election so to extend this agreement on or before December 1, 1936. Second Party agrees upon the expiration hereof, to cause all of the cars covered hereby to be returned to the First Party at Berkeley, California, or Oakland, California, and from time to time to cause all of the cars over and above the Permanent Cars, to be returned to the First Party at Berkeley, California, or Oakland, California, as hereinbefore provided, all of said cars

to be returned in the same condition in which they were [fol. 224] furnished, excepting for ordinary wear and tear.

Fifth: First Party agrees to maintain all cars covered by this agreement in good condition and repair according to present requirements of railroad companies and existing American Railway Association Mechanical Rules. No repairs shall be made by the Second Party for the account of the First Party without the written consent of the First Party. If any of said cars be held in railroad or car shops for repairs for a period longer than five (5) days from the date when the damage to or wreck of such car is reported to the First Party, then and in that event, rental or service charges covering such car shall cease from and after such period of five days until such car is released from the shop or until such car has been replaced by First Party by another car. The First Party shall have the right to substitute for any car leased hereunder, another car of the same type and capacity. The First Party shall not be liable for any damage to or loss of the whole or any part of any shipment made in any of the cars covered by this agreement, nor for any loss or damage arising through injuries or fatalities to persons, nor for destruction of or damage to said cars or any other property, which may be caused by any explosion or breaking of said cars, or any parts thereof, or the use of said cars, and said Second Party agrees to protect and save harmless said First Party from any such loss or damage to persons or property. If any of said cars are damaged or destroyed while on any privately owned tracks, the Second Party shall pay unto the [fol. 225] First Party the cost of repairing such damage or replacing such destroyed car or cars. The Second Party shall replace any removable tank parts (dome lids, outlet caps, safety valves, etc.), if lost or broken.

Sixth: The First Party shall collect all mileage earned by the cars covered by this agrement and keep all records appertaining to their movements. Second Party shall assist First Party in following the movements of said cars by furnishing to the First Party complete reports of the movements of cars, giving date, routing, and destination of each movement. The First Party shall each month credit to the rental or service account of the Second Party all mileage earned by said cars while in the service of

Second Party according to and subject to all rules of the tariffs of the railroads. Said mileage credit shall be reported to the Second Party on or about the twenty-fifth (25th) day of the month succeeding the month during which such mileage is earned. The Second Party agrees so to use said cars that their mileage under load shall be equal to their mileage empty on each railroad over which they move. Should the empty mileage on any railroad exceed the loaded mileage, the Second Party shall immediately upon the expiration or termination of this agreement, pay to the First Party for such excess, as so much additional rental or service charge at the rate established by the tariff of the railroad on which such excess of empty mileage is incurred.

Seventh: It is mutually agreed that time of payment of rental or service charges is of the essence of this contract, and that if the Second Party shall make default in the [fol. 226] payment of the rental or service charges for said cars at the time when the same become due and payable, and such default shall continue for five (5) days, or shall make default in the performance of any of the other agreements herein contained to be by it performed, and such default, other than the non-payment of the rental or service charges shall continue for a period of thirty (30) days after written notice thereof, then and in any of said events the First Party may terminate this agreement at its election, and the same shall become and be terminated, or may, at its election, take said cars out of the service of the Second Party and furnish the same or any thereof to others for such rental or service charges and upon such terms as it may see fit, and if a sufficient sum shall not be thus realized after paying all expenses of retaking said cars, and collecting the earnings thereof to satisfy the rental or service charges herein reserved, the Second Party agrees to satisfy and pay any and all such deficiency promptly upon demand from time to time.

Eighth: This agreement shall be binding upon the parties hereto, their respective successors, representatives, administrators, and executors, but shall not be transferrable by operation of law, or assignable by the Second Party, nor shall any rights hereunder with respect to said cars be transferred or assigned by the Second Party without the

written consent of the First Party. Should a petition in bankruptcy or a petition for a receiver be filed by or against the Second Party, or should it make an assignment [fol. 227] for creditors, then this agreement may, at the option of the First Party, be and become terminated. No title or leasehold or property interest of any kind in said cars, or any of them shall vest in the Second Party or its successors or assigns under the terms and provisions of this service contract, or by reason of the delivery of possession of cars to the Second Party or its use thereof thereunder. No lettering or marking of any kind shall be placed upon said cars or any of them by the Second Party.

In Witness Whereof, the parties hereto have caused this instrument to be executed by their respective duly authorized officers, and attested by their Secretaries, and corporate seals to be hereunto affixed the day and year first above written.

General American Tank Car Corporation, By Leroy Kramer, Vice President.

Attest: W. S. Hefferan, Jr., Secretary.

El Dorado Oil Works, By W. B. Reis, President.

Attest: S. M. Haslett, Secretary.

[fol. 228] Before Interstate Commerce Commission

No. 28515

Allowances for Privately Owned Tank Cars

Order — July 24, 1940

It appearing, That the El Dorado Oil Works and the El Dorado Terminal Company, its wholly owned subsidiary, hereinafter referred to as petitioners, have filed with the Interstate Commerce Commission a joint petition requesting the Commission, (1) to institute an investigation of the practices of carriers by railroad subject to the Interstate Commerce Act with respect to the payment of mileage allowances to the General American Tank Car Corporation for the use of tank cars owned by such corporation, leased to petitioners under a lease contract dated September 28, 1933, and furnished by petitioners to the carriers by railroad for the transportation of cocoanut oil in interstate commerce from the plants of petitioners at Berkeley and

Oakland, Calif.; (2) to find that the amounts collected by such corporation from the carriers by railroad as mileage allowances for the use of such cars in the period covered by the lease contract are reasonable, and to enter an order that such corporation may lawfully pay such amounts to petitioners; and (3) to enter such other orders as the Commission may consider proper.

Upon consideration of the said petition, and good cause appearing therefor;

It is ordered, That the Commission upon its own motion enter upon an investigation of the matters set forth herein, (1) to determine whether the practices involved under the terms and operation of the lease contract are unlawful in violation of the Interstate Commerce Act; (2) to determine whether a reasonable charge or allowance may be paid, and, if so, the amount thereof as a maximum to be paid by the carrier or carriers by railroad for the use of the tank cars furnished such carriers by petitioners for the transportation of the products of petitioners in interstate commerce from Berkeley and Oakland, Calif., in the period January 1, 1934, to December 31, 1936; and (3) to determine what findings shall be made, or what rules, regulations or practices shall be prescribed, or what orders shall be entered, to remove any unlawfulness that may be found to exist.

It is further ordered, That all common carriers by railroad participating in Trans-Continental Freight Bureau Tariff No. 3-N, I. C. C. No. 1452, be, and they hereby are, made respondents to this proceeding.

It is further ordered, That a copy of this order be served upon petitioners and upon each of said respondents and that notice of this proceeding be given to the public by posting a copy of this order in the office of the Secretary of the Commission in Washington, D. C.

And it is further ordered, That this proceeding be set for hearing at such time and place as the Commission may hereafter direct:

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 229] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 28545

In the Matter of the Petition of EL DORADO OIL WORKS and EL DORADO TERMINAL COMPANY for Investigation of Mileage Allowances by Interstate Carriers for the Use of Tank Cars of Private Ownership

PETITION OF GENERAL AMERICAN TRANSPORTATION CORPORATION FOR LEAVE TO INTERVENE

(Presented and Allowed at Hearing Dec. 9, 1940)

Comes now your petitioner, General American Transportation Corporation, and respectfully represents that it has an interest in the matters involved in the above entitled proceeding and desires to intervene in and become a party to said proceeding, and for grounds of the proposed intervention petitioner says:

I

That petitioner, General American Transportation Corporation, is a corporation organized and existing under and by virtue of the laws of the State of New York and having its principal office in Chicago, Illinois; that petitioner is the owner of and is engaged in the business of furnishing vari[fol. 230]ous types of freight cars, including tank cars, for use in the transportation of property by railroad in interstate commerce, including cocoanut oil and other liquid commodities.

II

That petitioner is the successor in interest to and has acquired all the assets and assumed all the liabilities of General American Tank Car Corporation, hereinafter referred to as the "Tank Car Corporation"; that among the assets and liabilities so acquired and assumed by petitioner are the rights and obligations of the Tank Car Corporation under a contract dated September 28, 1933, with El Dorado Oil Works, a copy of which is attached as Exhibit "A" to the petition of El Dorado Oil Works and El Dorado Terminal Company in the above entitled proceeding.

III

That on June 19, 1935, El Dorado Terminal Company, as the assignee of El Dorado Oil Works, brought suit against the Tank Car Corporation to recover certain sums alleged to be due under said contract as the balance of mileage allowances for the use of said tank cars during the period from January 1, 1934 to May 31, 1935, inclusive; that the Tank Car Corporation pleaded as its defense to said suit that it was prohibited by the Elkins Act from [fol. 231] paying said sums to El Dorado Oil Works or to El Dorado Terminal Company; that the Supreme Court of the United States by its decision in said suit, reported in 308 U. S. 422, has ordered that the cause be held in the United States District Court for the Northern District of California, Southern Division, pending administrative action by the Commission; that a further suit by El Dorado Terminal Company to recover certain additional sums from the Tank Car Corporation as mileage allowances on said tank cars during the period from June 1, 1935 to January 31, 1937, inclusive, is now pending in said District Court; that by reason of said decision of the Supreme Court of the United States the determination of the Commission in the above entitled proceeding will directly affect the decision of the District Court in said suits.

IV

That by virtue of the provisions of Section 2 of the Elkins Act (U. S. Code, Title 49, Sec. 42) the Commission is authorized to include as parties in the above entitled proceeding "all persons interested in or affected by the rate, regulation or practice under consideration"; that by reason of the facts heretofore alleged your petitioner has an interest in and is affected by the practices under consideration in said proceeding.

[fol. 232] Wherefore, petitioner prays leave to intervene and be treated as a party hereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person and by counsel upon brief and at the oral argument, if oral argument is granted.

Dated at Chicago, Illinois, November 5, 1940.

General American Transportation Corporation,
Petitioner, by Lester N. Selig (Sig.) President,
135 South LaSalle Street, Chicago, Illinois.

W. S. Hefferan, Jr., 135 South LaSalle Street, Chicago, Illinois; Douglas F. Smith, 11 South LaSalle Street, Chicago, Illinois; Allan P. Matthew, John O. Moran, F. W. Mielke, 1500 Balfour Building, San Francisco, California, Attorneys for Petitioner.

[fols. 233-234] *Duly sworn to by Lester N. Selig. Jurat omitted in printing.*

[fols. 235-236] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 28515

In the Matter of: Allowances for Privately Owned Tank Cars

San Francisco, California,
December 9, 1940, 10:00 A. M.

Before Elroy F. Hinman, Special Agent, Interstate Commerce Commission. F. L. Sharp, Examiner

Met pursuant to notice.

APPEARANCES:

W. F. Williamson, 310 Sansome Street, San Francisco, California, appearing on behalf of El Dorado Oil Works and El Dorado Terminal Company, Petitioners.

J. Carter Fort, Transportation Building, Washington, D. C., appearing on behalf of Alton and Southern Railroad; The Alton Railroad Company; Atlanta, Birmingham and Coast Railroad Company; Atlanta and West Point Rail Road Company; Atlantic and Yadkin Railway Company; Atlantic Coast Line Railroad Company; Baltimore and Ohio Chicago Terminal Railroad Company; The Baltimore and Ohio Railroad Company; Bessemer and Lake Erie Railroad Company; Boston and Maine Railroad; Burlington Lines (Chicago, Burlington & Quincy Railroad Company; The Colorado and Southern Railway Company; [fol. 237] Fort Worth and Denver City Railway Company; The Wichita Valley Railway Company); Canadian National Lines in the United States; Central Vermont Railway Inc.; Chesapeake and Ohio Railway Company; The

New York, Chicago & St. Louis Railroad Company; Chicago & Eastern Illinois Railroad; Chicago & Illinois Midland Railway Company; Chicago and North Western Railway System (Chicago and Northwestern Railway Company; Chicago, St. Paul, Minneapolis and Omaha Railway Company); Chicago, Indianapolis and Louisville Railway Company (Holman S. Pierbone, Trustee); Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Henry A. Scandrett, Walter J. Cummings, George I. Haight, Trustees); Chicago, Rock Island and Pacific Railway Company (Frank O. Lowden, James E. Gorman, Joseph B. Fleming, Trustees); The Delaware and Hudson Railroad; The Delaware, Lackawanna and Western Railroad Company; The Denver and Salt Lake Railway Co.; Detroit, Toledo and Ironton Railroad Company; Erie Railroad Company, the New Jersey and New York Railroad Company, Chicago and Erie Railroad Company (Robert E. Woodruff and John H. Halden, Trustees); Florida East Coast Railway (William R. Kenan, Jr., and Scott M. Loftin, Receivers); Galveston, Houston and Henderson Railroad Company; Georgia Railroad; Grand Trunk Western Railroad Company; Great Northern Railway Company; Illinois Central System; Indianapolis Union Railway Company; Lehigh and New England Railroad Co., Lehigh Valley Railroad Company, Louisville & Nashville Railroad Company; Maine [fol. 238] Central Railroad Company; Minneapolis & St. Louis Railroad Company (L. C. Sprague, Receiver); Minneapolis, St. Paul & Sault Ste. Marie Railway Company (G. W. Webster and Joseph Chapman, Trustees); Mississippi Central Railroad Company; Missouri and Arkansas Railway Company; Missouri-Kansas-Texas Railroad Company; Missouri-Kansas-Texas Railroad Company of Texas; Missouri Pacific Lines (Missouri Pacific Railroad Company; Gulf Coast Lines; International-Great Northern Railroad Company) (Guy A. Thompson, Trustee); Nashville, Chattanooga & St. Louis Railway; New York Central System; New York, New Haven and Hartford Railroad Company; Norfolk and Western Railway Company; Northern Pacific Railway Company; Pennsylvania Railroad Company; Pere Marquette Railway Company; Piedmont and Northern Railway Company and Durham and Southern Railway Company; Reading Company, and Pennsylvania-Reading Seashore Lines; St. Louis-San Francisco Railway Company and subsidiaries (J. M. Kurn and John

G. Londsdale, Trustees); St. Louis Southwestern Railway Lines (Berryman Henwood, Trustee); Seaboard Air Line Railway (L. R. Powell, Jr., and Henry W. Anderson, Receivers); Southern Pacific Company, Texas and New Orleans Railroad Company, Northwestern Pacific Railroad Company and San Diego & Arizona Eastern Railroad Company; Southern Railway System Lines (Southern Railway Company; Alabama Great Southern Railroad Company; Cincinnati, New Orleans and Texas Pacific Railway Company; Georgia Southern and Florida Railway Company; New Orleans and Northeastern Railroad Company) et al.; [fol. 239] Tennessee Central Railway Company; Terminal Railroad Association of St. Louis and affiliated companies; Texas and Pacific Railway Company and subsidiaries; Union Pacific Railroad Company; Virginian Railway Company; Western Maryland Railway Company; Western Pacific Railroad Company; The Western Railway of Alabama; Wheeling and Lake Erie Railway Company; Respondents.

L. N. Bradshaw, 878 Mills Building, San Francisco, California, appearing for The Western Pacific Railroad Company, Respondent.

R. E. Wedekind, 65 Market Street, San Francisco, California, appearing for Southern Pacific Company, Respondent.

Joseph S. Lafferty, 80 East Jackson Boulevard, Chicago, Illinois, appearing for Atchison, Topeka & Santa Fe Railway Company, Respondent.

W. S. Hefferan, 135 South La Salle Street, Chicago, Illinois; Allan P. Matthew, F. W. Mielke, and Starr Thomas, 1500 Balfour Building, San Francisco, California, appearing for General American Transportation Corporation, Intervener.

[fol. 240] Proceedings

Exam. Sharp: The hearing will come to order.

The Commission has set for hearing at this time Docket No. 28515, Allowances for Privately Owned Tank Cars.

This is a proceeding instituted by the Commission upon the petition of El Dorado Oil Works and El Dorado Terminal Company to determine:

1. Whether the practices involved under the terms and operation of a lease contract dated September 28, 1933, by and between General American Tank Car Corporation and

El Dorado Oil Works are unlawful and in violation of the Interstate Commerce Act;

2. Whether a reasonable charge or allowance may be paid and, if so, the amount thereof as a maximum to be paid by the carrier or carriers by railroad for the use of the tank cars furnished such carriers by petitioners for the transportation of the products of petitioners in interstate commerce from Berkeley and Oakland, California, in the period January 1, 1934, to December 31, 1936, and

3. What findings shall be made or what rules, regulations, or practices shall be prescribed or what orders shall be entered to remove any unlawfulness that may be found to exist.

I will be glad to have your appearances now starting with petitioners.

[fol. 241] Mr. Williamson: I have filed an appearance, W. F. Williamson, for the El Dorado Oil Works and the El Dorado Terminal Company.

Exam. Sharp: Other appearances for the tank car corporations?

Mr. Fort: J. C. Fort. I have filed an appearance for the respondents generally and filed a list of the respondents for whom I appear.

Exam. Sharp: You said respondents, did you not, Mr. Fort?

Mr. Fort: Yes, sir.

Exam. Sharp: All right, go ahead.

Mr. Matthew: If the Examiner please, I should like at this time——

Mr. Fort: There are some other appearances.

Mr. Matthew: Pardon me. I understand there are to be more appearances for the respondents.

Mr. Bradshaw: On the other appearances for respondents, Mr. Examiner, L. N. Bradshaw of the Western Pacific Railroad Company.

Mr. Wedekind: R. E. Wedekind, 65 Market Street, San Francisco, California, for the Southern Pacific Company.

Mr. Lafferty: J. S. Lafferty, 80 East Jackson Boulevard, Chicago, Illinois, for the Atchison, Topeka and Santa Fe Railway Company.

Exam. Sharp: That appears to be all for the respondents, [fol. 242] Mr. Matthew.

Mr. Matthew: With the Examiner's permission, I should like at this time to offer the petition of General American Transportation Corporation for leave to intervene in this proceeding. I am submitting now the original verified petition of General American Transportation Corporation and two copies for the Commission and I likewise have copies for counsel.

If leave to intervene is granted I should like to enter the appearances of W. S. Hefferan of Chicago, Illinois; Allan P. Matthew, F. W. Mielke, and Starr Thomas for the intervener.

Exam. Sharp: Mr. Matthew, the petition of the intervener does not broaden the issues in the case, I take it?

Mr. Matthew: No! at all, if Your Honor please. It is rather a brief formal petition for leave to intervene setting forth the interest of the General American in the case and particularly the fact, of course, that this controversy in the first instance was between the El Dorado Company and the General American.

Exam. Sharp: The petition will be granted.

The petitioners may proceed.

OPENING STATEMENT FOR PETITIONERS

Mr. Williamson: Mr. Examiner, I presume that the best course for us to pursue is to acquaint you with the history of the facts and the transactions out of which this controversy arose and I shall therefore briefly do so on behalf [fol. 243] of the petitioners.

The El Dorado Oil Works is a California corporation and has been engaged for forty-five years or more in the crushing of copra to extract therefrom coconut oil, an oil that is used for soap manufacture and also to a certain extent in the edible field.

The El Dorado Terminal Company is a wholly owned subsidiary of the El Dorado Oil Works formed in 1933 in order to handle the unloading and movement of shipments over the wharf which they have constructed on the Oakland harbor.

The history of our tank car operations is along these lines: When we first organized this company we organized it as a linseed oil company but there being very little flaxseed at that time grown in California, after a few years

we had broadened our operations so as to get into a wider field of activity and we went into the coconut oil manufacture.

At that time, and up to the time of the outbreak of the Spanish-American War in 1898, almost all of the finer soaps utilized in the United States were made abroad and most all of the copra produced in the Philippine Islands to the extent of 98 per cent of that copra was shipped to Europe and was crushed at either Hamburg or Marseilles or other points and such of the manufacturers or users of coconut oil as required in the United States imported the oil from abroad.

The El Dorado Oil Works in entering into that field was [fol. 244] confronted by the condition, first, that the users of cocoanut oil in manufacturing purposes had to be assured of a quality of oil that would meet their demands. The soap makers could not expand their operations in America and do away with the use of other substances substituting cocoanut oil therefor without knowing that there would be a supply. Our first venture was to make a quality of oil that would be suitable and we finally, after a good deal of experimentation, developed a standard brand or quality of cocoanut oil which was white, very white in color, low in acid, to which we gave the name Snowflake and for which we obtained a trademark.

Our operations over the intervening forty-five years have been largely in the marketing of that quality of cocoanut oil. After we had developed the quality we had to assure the buyers and the users who were going to expand their soap factories to employ this oil that we could furnish them the quantities they desired and, therefore, we had to finance the sailing vessels going out of San Francisco Harbor into all of the islands of the Pacific and assure them a return cargo of copra in order that they might make the voyage, and we did so, and over the years we developed contacts in all of the Pacific islands and assured to ourselves a regular supply of copra, so, in fact, the ocean became a warehouse for us.

Now, when we first started to ship our cocoanut oil we found that there were buyers who had tank cars for the [fol. 245] transportation of copra oil that they purchased from us, but, as I say, our operations in those days were comparatively small. As time went on and as our crushing became larger and shipments became heavier it was neces-

sary for us to have more and a greater means of transportation. If our business was purely local like a big department store we could get delivery wagons or maybe trucks which were not then in use but have since come into use, but our shipments were almost entirely into the Great Mississippi Valley area which was generally the consuming point in the United States for cocoanut oil, and as we had to move our oil in order to keep our plant operating we had to provide a means of moving it and the logical means was tank cars, and, therefore, we were confronted with the necessity of either owning the tank cars, buying them or renting them.

In our study that was made following the decision of the Commission in 1918 in the matter of private cars which is reported in 50 I. C. C., I think 652, or that volume at least, we ascertained that it was perfectly proper and feasible to lease tank cars for our purposes and we, therefore, engaged in that line of operation. But there was something else that made it advisable, if not absolutely necessary for us, to secure tank cars of our own selection because we found that the slightest bit of foreign matter in the ordinary tanks would serve to discolor our oil and destroy its usability for those who wanted the standard white Snowflake oil, and we would have oil turned back [fol. 246] on us, so that we found it was necessary for us to clean every car that we used so that we could be assured that there were no particles of rust and no foreign matter in the cars.

There were at that time petroleum cars, and there are today petroleum cars owned by the railroads, but those cars were not usable by us because we could not clean them adequately in view of the matter such as gasoline and petroleum residuals and so on in the cars.

We made our first arrangement or lease with the General American Tank Car Corporation and according to that lease we paid a cash rental monthly for every car that we leased so that if the cars by reason of strikes or other conditions were idle we still paid the rent, the monthly rental.

The second part of our agreement provided that the Car Corporation would credit to us against our rentals the mileage earned and payable by the interstate carriers according to their filed and published tariffs.

We worked under that agreement with the General American Tank Car Corporation continuously thereafter, renewing their contracts as each one expired, making a new one on substantially the same terms. In September, 1933, as our contract then in effect was about to expire, we entered into an agreement with the General American Tank Car Corporation for the lease of fifty cars at a monthly [fol. 247] rental for a period of three years, as I remember it, and for such additional cars as our business required in the transportation of our product. The contract was to take effect as of January 1, 1934, and it did so.

For the first four or five months of that year the General American Tank Car Corporation continued as it had under previous contracts, to account to us monthly for the mileage collected from the carriers and to pay to us, the El Dorado Oil Works, the overage, if any, above the car rentals. Along about, I think it was in July of 1934, the General American Tank Car Corporation took a different position. It contended that the decision or order as recently released by the Commission in a proceeding in respect to the refrigerator cars had determined that the payment of mileage to shippers leasing tank cars in excess of rentals paid by them for the use of cars was, in effect, under the facts as disclosed in that record a rebate or preferential treatment to which the shippers were not entitled and the Commission made an order that served to limit the payments of mileage as expense to the rentals and other expenses in connection with the furnishing of the cars, but it expressly provided that although there had been some investigation as to tank cars the evidence was insufficient to enable the Commission to make any decision or order in that behalf and, therefore, directed that the order of the Commission should be limited to refrigerator [fol. 248] cars, and it was so limited.

We endeavored to secure from the Tank Car Corporation a continuance of the payments that it had theretofore made to us, but the Tank Car Corporation took the position that in the light of the decision of the Commission in respect to refrigerator cars it could not continue those payments because in so doing it would lay itself open to the charge of a violation of the Elkins Act, those provisions of the Interstate Commerce Act which had been embodied in the Elkins Act originally.

Failing to get any relief we filed a suit in the courts at San Francisco to recover from the General American Tank Car Corporation the amount of money which, under the terms of our contract, we were entitled to receive as the sum received by the Tank Car Corporation in excess of the rentals that we had paid.

That case was heard in the United States District Court at San Francisco. The defense of the General American Tank Car Corporation was simply this: It pleaded the contract between the two corporations, attesting to its complete legality and so pleading it. It pleaded that the payment of the mileage in excess of the car rentals would amount to a prohibitive discrimination or preference under the Elkins Act and that the payment by the Tank Car Corporation in accordance with its agreement would lay [fol. 249] it open to criminal charges. The District Court decided that case in favor of the Tank Car Corporation.

The El Dorado Oil Works appealed it to the Circuit Court of Appeals in this, the Ninth Circuit, and after hearing an argument the Circuit Court of Appeals rendered an opinion reversing the lower court and sustaining in its entirety the claims of the El Dorado Oil Works and its subsidiary, the Terminal Company.

Thereafter, the Tank Car Corporation filed a petition in the Supreme Court of the United States in certiorari for hearing of the case. The Interstate Commerce Commission and its counsel in Washington, Mr. Payne, filed a brief and joined in that petition. The hearing was granted and in due time the case was heard and argued in Washington and a decision rendered by the Supreme Court of the United States which I can briefly summarize as follows: It held that such agreements as that with which we were concerned are usual and in themselves proper and nothing unlawful about them. It held that under the terms of that agreement the El Dorado Oil Works was the shipper, the shipper was the company that furnished or supplied the tank cars to the carrier, and, therefore, was entitled under the terms of the Interstate Commerce Act to have and receive that just and reasonable compensation that is provided in the Act to be paid to the furnisher of the facility.

It had been urged by the Tank Car Corporation that it, [fol. 250] and not the El Dorado Oil Works, had furnished the cars. The court took the other view and held that the

shipper, the El Dorado Oil Works, had furnished the cars and was, therefore, entitled to the compensation, the contention having been urged that the rules and regulations of the carriers provided for the payment of the mileage to the car owner or supplier according to the reporting marks on the cars, etc., and since the Tank Car Corporation's name was stenciled upon the cars and it was the recorded reported owner of the cars the carriers had paid the mileage over the intervening years to the Tank Car Corporation, and it was argued that the shipper was not entitled, by reason of those provisions, those rules, to claim the mileage. As to this, the Supreme Court said that the shipper furnished the cars and was entitled under the law to the mileage allowance but could not collect it by reason of the fact that it was not according to the tariff of the recorded owner and had no reporting marks upon the cars and the carriers could not divest or destroy the right of the shipper to receive that just and reasonable compensation by any rule or regulation whatever. Finally the court said that because of the fact that the payments had been made by the carriers to the car owner and because the El Dorado Oil Works, as a shipper, was entitled to the compensation as a practical matter but was not entitled to collect it from the carriers because of the limitation in the rules, the mat-
[fol. 251] ter was open for consideration by the Commission as an administrative question and finally the court then suspended further proceedings and remanding the case in the civil action pending an investigation by the Commission of the matters involved.

It was because of that decision and the statements therein to the effect that the Commission should have the opportunity to make an investigation that we applied for this investigation, or this hearing.

Now, I don't know to what extent the Commission is going to go into this matter. There are certain points that, of course, are settled by the decision of the Supreme Court of the United States.

I assume that you, as an Examiner, and the Commission, *is* not going to reverse the Supreme Court on those questions. I assume also that your investigation, without some charge of which we have no present knowledge, is not going to cover the question of good faith as between the two parties to this contract. In other words, there has been no charge and no contention direct or indirect that this

agreement was made between the General American Tank Car Corporation and the El Dorado Oil Works as a cloak to cover any secret rebate agreement or any improper plan whereby the provisions of the law would be gotten around. There has been no such charge, and the contract as between the two companies was by them regarded as perfectly legal in itself as attested by the fact that the Gen- [fol. 252] eral American Tank Car Corporation pleaded the contract in the case where it was sued for the mileage collected and retained by it.

Now, as you can see from this statement that I have made, our controversy with the Tank Car Corporation covers mileage collected and retained by the Tank Car Corporation for car movements that have extended over a period beginning six years ago, and during all the first portion of that period, until April 1, 1935, the rules of the carriers provided that the mileage payment of one and one-half cents per mile loaded and in empty movement would be payable to the owner of the car, or the party who acquired the same, according to the reporting published, the recorded marks. Commencing with April 1st, 1935, and, if we can indulge in assumptions, presumably because of the decision of the refrigerator car case, these rules were changed so that thereafter the payments were to be made to the car owner but not to the lessee, and that is something that the Supreme Court spoke of. Now, notwithstanding the fact that the cars were furnished by the El Dorado Oil Works as the necessity of their business required after the decision in the refrigerator car case just as they had been before that time, and notwithstanding the fact that the Car Corporation continued to collect and did collect the full mileage on those cars at all times since and up to this day, it has failed to pay to the shipper, El Dorado Oil Works, any portion of that mileage so re- [fol. 253] ceived beyond the car rentals. In other words, there has always been a credit to the Car Corporation's books an excess of mileage earnings over car rentals.

Now, unless you have some other question I think that generally states the facts in the case. As I said before, we have prepared a brief statement outlining the views of the El Dorado Oil Works as regards the scope of this hearing. We have in mind that the Commission, if it is going to go into the matters at all, is going to be confronted with this situation that throughout this period

there have existed rules published with regard to the payment of car mileage. Those rules, up to April 1st, 1933, permitted the payment to the supplier of the car, whether he be shipper or owner, as well as to the owner, and the carriers have paid the mileage provided to be paid under those rules monthly to the Car Corporation.

It was suggested by counsel for the Interstate Commerce Commission in the matter before the Supreme Court that the railroads had improperly paid this money to the Tank Car Corporation and that it behooved them to get it back.

Of course, that matter is not before you, I take it, but it is just a question that is worthy of some consideration.

The El Dorado Oil Works, realizing that the carriers have paid the mileage once, of course, did not desire to go after the carriers for a further payment, and as to the [fol. 254] past, our position is that in the first place the Interstate Commerce Commission cannot very well temporarily go back of the fact that as early as 1918 it countenanced and expressly approved, and, in fact, ordered the practice which was then old of paying mileage to shippers, as well as car owners, for the furnishing of facilities such as tank cars should be continued. It increased the then mileage allowance of three-quarters of a cent on empty and loaded movement in cars to one cent.

In 1926 the carriers filed a revised rule allowing one and one-half cent per mile for these cars. That was published and has been effective ever since, so that could not have been done had the Commission either objected to the practice, which it naturally would not have done in view of this order in the private car matter in 1918, or if it objected to the amount it had ample machinery under the law to either, by proceeding upon complaint or proceeding on its own initiative, go into those questions, so that we start with the assumption that the one and a half cent mileage allowance has been approved and recognized as a perfectly valid and legal allowance over this intervening period of fourteen years, and we do not know whether you, as Examiner, are going to go into that question or not, but we are, as I say, proceeding upon the assumption that what the Commission has allowed to stand without question over these years represents what the Commission considers a just and reasonable allowance for the furnishing of tank [fol. 255] cars.

Now, then, in the absence of any contention or claim that the agreement between the General American Tank Car Corporation and the El Dorado Oil Works reflected a secret or private arrangement of any type or character to get around the provisions or the prohibitions of the law, we assume that there is not such issue as that presented and, therefore, we can only ask as to the past that this Commission shall in some form determine in line with the decision of the Supreme Court of the United States that the agreement between the Tank Car Corporation and the El Dorado Oil Works was not an unlawful agreement, and that there was no legal or moral obstacle in the way of its performance by both parties.

As to the future question it is different. The Commission cannot by anything that it can do today undo the fact that the tariffs and the rules and regulations have been published and have existed and been performed for all these years, but I have no doubt that the Commission has entire and complete authority to investigate the matter and make such rules or orders as it desires as to the future of these contracts, and, perhaps, the evidence that we shall offer to the Examiner today and hereafter will conduce to [that] a proper determination of that question.

COLLOQUY

Mr. Matthew: If the Examiner please, I have no desire to reply in extenso to counsel's statement, but I would not [fol. 256] have it assumed that I agree entirely with his characterization of the proceedings and particularly with the decision of the Supreme Court. I assume that the decision of the court will speak for itself. I do, however, wish to comment briefly upon one element of his opening statement.

Mr. Williamson said that the Car Corporation had pleaded the contract in its answer to the suit brought by the El Dorado Company thereby attesting the validity of the contract.

The facts are these: The El Dorado Company brought suit upon the contract but did not set forth the contract in haec verbis. It merely undertook to characterize the contract in its complaint. We thought that the characterization of the contract in the complaint was somewhat inexact and certainly incomplete. Therefore, in our answer we pleaded the precise terms of the contract.

That is all I care to say at this juncture.

Mr. Fort: Mr. Examiner, I should like to reserve the right to make any opening statement, if one seems to be desirable, to the conclusion of the testimony which would be introduced by the petitioners.

Exam. Sharp: I take it, Mr. Williamson, that your suit involved the amount of money that you thought ought to have been paid to you between April 1, 1935, and December 31, 1935?

Mr. Williamson: No; the suit involved the amount that [fol. 257] was claimed by us from, I think, June, 1934, up to a date in the spring of 1935. It included, I think, the month of March, maybe the month of April, 1935. There was another suit which has not yet been heard which involved the amounts accruing to our credit after that date.

Exam. Sharp: Well, I understand from your opening statement that the carriers or the Tank Car Corporation ceased paying you the difference between the amount of your rental and the earnings of the car on April 1 of 1935?

Mr. Williamson: No, you are not correct in that, sir.

I said that following the decision of the Commission in the order in the refrigerator car matter in 1934 they had ceased to pay it and our case hooks up with the period when they stopped paying it in 1934.

Exam. Sharp: They stopped paying it after the decision?

Mr. Williamson: In the refrigerator car case.

Exam. Sharp: In privately owned refrigerator cars, 201 I. C. C. 323?

Mr. Williamson: That is the case.

Exam. Sharp: That was decided when?

Mr. Williamson: I think it was the first few days after July, 1934. I have it here, a copy of it here.

Mr. Matthew: It is dated July 2nd, 1934.

Mr. Williamson: July 2nd. I said the first few days.

Exam. Sharp: Did the Tank Car Corporation cease pay- [fol. 258] ing you that difference as of July 1, 1934?

Mr. Williamson: Well, under our arrangements the El Dorado Oil Works shipped its oil out and reported its shipments to the Tank Car Corporation. The Tank Car Corporation in turn checked the movements of the cars and the mileage earned thereon and collected it from the railroads and thereafter paid it over to us.

In the mechanics, the working out of the mechanics of that arrangement, it necessarily followed that perhaps sixty

days or more intervened between the car movement and the receipt by us of any of the mileage earned and that, therefore, when the Tank Car Corporation took its position immediately following upon the decision in the matter of the private owned refrigerator cars the first of July, if accounted for earnings up to, I believe, May of 1924 ——

Exam. Sharp: Yes.

Mr. Williamson: But car earnings after that time were not paid over and were involved in the suit that was filed.

Mr. Matthew: If Mr. Williamson will permit this statement, which I think will clarify the matter a little, Mr. Williamson's first suit covered the period of seventeen months commencing with January, 1934, and ending with May of 1935. In substance, however, the suit really covered that period but diminished by five months, namely, the first five months of 1934 because the Car Corporation had accounted [fol. 259] to the El Dorado Company and paid over the excess of the mileage earnings which accrued during the first five months of 1934.

Exam. Sharp: That is my understanding, yes.

Mr. Williamson: My statement was to May, and that is the five months. That confirms just exactly what I stated.

Mr. Matthew: Well, I think there was a slight difference there, if I understood you.

Exam. Sharp: Well, the order of the Commission itself says in the period January 1, 1934, to December 31, 1936, and I took it that you couldn't ask for more than the difference between the time when they stopped paying you and the end of your contract.

Mr. Williamson: That is correct. If the Commission is going to assume the authority to determine that we are entitled to compensation for the life of our contract with the General American Tank Car Corporation that would normally extend, as the order says, from January 1st, the commencement date of the contract, to December, 1936, the ending date of the contract, but, except, however, as Mr. Matthew says and as we stated previously, the first five months of the contract were already paid for by the Tank Car Corporation.

Exam. Sharp: Yes.

Mr. Williamson: So that in effect as between the General American Tank Car Corporation and ourselves our claim for mileage dates from May, 1934, to December, 1936,

[fol. 260] although the suit in the Supreme Court of the United States did not extend over that whole period.

There was another suit filed, which has not been tried, for the balance of the period.

Exam. Sharp: Is that because your suit was brought before the time it expired?

Mr. Williamson: Yes. We claimed in one suit the amount due or claimed by us up to that date. Then, we filed another suit claiming the amount becoming due to us from that date on and that suit has not been heard.

Exam. Sharp: I just wanted to make one observation with respect to your comment and that was that you called the proceeding in 201 I. C. C. 323, a refrigerator car case, and in that case the Commission said, "The discussion herein has been confined almost entirely to refrigerator cars and the findings will be so restricted, but the general principles enunciated apply equally to all other types of private cars."

Mr. Williamson: Yes.

Exam. Sharp: You may proceed with your case.

Mr. Williamson: We would like to call as a witness Mr. Gilmore.

Exam. Sharp: Be sworn, please.

H. V. Gilmore was sworn and testified as follows:

Direct examination.

By Mr. Williamson:

Q. You are a chemist by profession?

[fol. 261] A. Yes.

Q. A graduate of what institute?

A. The University of California.

Q. University of California. Where are you employed?

A. I am at the El Dorado Oil Works.

Q. How long have you been employed there?

A. Since November of 1932.

Q. In your employment are you familiar with the manufacture of oils, cocoanut oil at that plant?

A. Yes.

Q. And have you been over all that period?

A. Yes.

Q. And have you had anything to do with the testing or shipping of that oil?

A. Yes, I have.

Q. For all the time that you have been there?

A. Practically all the time.

Q. Now, are you able to describe the cocoanut oil manufactured by the El Dorado Oil Works with regard to its color and its acid content, etc.?

A. Yes.

Q. Will you state——

A. Well, our color is always held to the maximum of 20 yellows and 2½ reds by the Lovibond scale.

Exam. Sharp: I would like you to remember you are talk-[fol. 262] ing for the record, not to Mr. Williamson. Talk loudly so we can all hear. They have a right to that information.

By Mr. Williamson:

Q. You said 20 yellows——

A. 20 yellows and 2½ reds by the Lovibond scale. That is the color specification for our Snowflake Cocoanut Oil. For our Super Cochin grade, as we call it, it is 5 yellows and 5/10 of a red.

Now, the free fatty acid content is 6 per cent maximum for Snowflake grade and 500ths of 1 per cent for Super Cochin.

Exam. Sharp: What is that word, that last word?

Mr. Williamson: Super Cochin.

By Mr. Williamson:

Q. Now, have you a knowledge of the other types or brands of cocoanut oil?

A. Yes.

Q. Besides your own?

A. Yes.

Q. And a knowledge of the difference between them and the El Dorado type of oil?

A. Yes.

Q. And what is the difference?

A. The Manila grade is variable but it is usually approximately 40 yellows and 6½ reds in color, sometimes greater, sometimes less.

Q. Have you samples of both types of oil?

A. Yes, I have.

Q. Will you produce them?

[fol. 263] A. (Witness produces samples).

Q. Now, Mr. Gilmore, will you produce for us a sample of the El Dorado Oil Works Company's cocoanut oil of the standard quality known as Snowflake.

A. (Producing sample.)

Exam. Sharp: Do you propose to offer these as exhibits?

Mr. Williamson: I think so. I believe, if you will accept them, we would like to have you have them because they are going to show the effect of foreign matter and hence the necessity for our operating on the cars before we use them.

Exam. Sharp: Yes, sir. Well, then, as he presents each exhibit will you have it described and we will number it for identification.

Mr. Williamson: All right, sir. I was going to offer them all but we will offer them singly.

Exam. Sharp: Yes, sir.

Mr. Williamson: That is the first one, then, the Snowflake oil. That is a light—a white oil.

Exam. Sharp: How it is labeled?

The Witness: It is labeled "Snowflake type cocoanut oil." The color on this sample is 20 yellows, 2 4/10 reds.

Exam. Sharp: That will be marked No. 1 for identification.

(Exhibit 1, Witness Gilmore, marked for identification.)

By Mr. Williamson:

Q. Now, will you produce a sample of the type of crude [fol. 264] cocoanut oil, or that is also sometimes referred to as Manila oil, is it not?

A. (Witness produces sample.)

Q. Will you state to the Examiner the reading on that label?

A. That is Manila type. Its color is 40 yellows, 5 5/10 reds. It is a light colored Manila oil. It is the darkest we had at the time.

Exam. Sharp: Did you say that was sometimes known as crude oil?

The Witness: Yes.

Exam. Sharp: Mark that Exhibit No. 2 for identification.

(Exhibit 2, Witness Gilmore, marked for identification.)

By Mr. Williamson:

Q. Have you a sample of the Snowflake oil affected by any foreign matter so as to show its change in color or type?

A. This is a sample containing 100 parts per million of iron as iron soap; it is in the form of iron soap.

Exam. Sharp: What?

The Witness: Snowflake grade.

Exam. Sharp: Iron what?

The Witness: It is in the form of iron soap in solution; it is a combination of iron and cocoanut oil.

Exam. Sharp: Is the word "soap"?

The Witness: Yes.

By Mr. Williamson:

Q. To make it perfectly clear to the Examiner, this third [fol. 265] sample that you produced is the same oil as the Snowflake that you first produced?

A. Yes.

Q. Affected by the foreign matter to the extent of 100 parts per one million units of the oil?

A. Yes.

Mr. Williamson: You can see the difference in color.

By Mr. Williamson:

Q. Now, you said that that discoloration and effect was the result of foreign matter which you spoke of as iron soap. Now, will you explain to the Examiner more in detail just what that is? I think he may have some difficulty in understanding what an iron soap is.

Exam. Sharp: Yes, he does.

A. Well, iron soap is a definite chemical compound similar to our ordinary washing soap but in place of sodium being incorporated in it, iron is the metallic element. A soap, as a chemical term, is a generic term. It covers a multitude of chemical compounds that are grouped in one family. They are compounds of a vegetable oil and have a metallic element. In this case iron is the metallic element. In the common washing soap sodium and potassium are the metallic elements.

By Mr. Williamson:

Q. Now, Mr. Gilmore, with that explanation will you state how the change was brought about from the very white color of this first sample, or Snowflake oil, and the very dark or red color of the third sample that you produced.

[fol. 266] A. (No response.)

The Examiner: Mark that No. 3 for identification.

(Exhibit 3, Witness Gilmore, marked for identification.)

The Witness: You have in your dirty tank cars iron in the form of iron rust, of which this is a sample that was scraped from a tank car. Now, that will slowly act with cocoanut oil, especially with the higher acid cocoanut oil, to form a definite chemical compound, or iron soap, of which that is a sample.

Exam. Sharp: Mark the first as No. 4, and the second as No. 5.

(Exhibits 4 and 5, Witness Gilmore, marked for identification.)

By Mr. Williamson:

Q. Referring to your Exhibit 4 marked "iron rust from tank cars" will you state whether that is a substance that was taken by you from the tank cars that come into the plant of the El Dorado Oil Works for the shipment of oils?

A. Yes. That was taken from a tank car.

Q. And will you state what the effect of that iron or rust, as you call it, would be upon the El Dorado Works flake oil if it were not removed from the car before the car is loaded with Snowflake cocoanut oil?

A. If it were not removed from the car, then we would have an oil similar to that sample over there.

[fol. 267] Q. Which sample; No. 3?

A. The one that is contaminated.

Exam. Sharp: Known as Exhibit No. 3.

The Witness: Yes. It might be far worse than that. I have seen samples that run as high as 7 and 8 reds in color. Now, the worst part of it is that an oil contaminated with iron is difficult to bleach and in the present production of very white soaps it would make a poorly colored soap. The

soap maker will take our Snowflake cocoanut oil and he may bleach it further to make a soap that is suitable for his market but if he had an oil that would color it like that sample that is discolored he would have a very difficult time of bleaching it and producing the soap that he desires.

By Mr. Williamson:

Q. You have be actively connected with the loading of the tank cars and the shipment of them for a period of years, have you not?

A. Yes.

Q. Have you ever had personal knowledge of the effect of a shipment of oil where the tank cars were not properly cleaned?

A. Yes.

Q. And what was the effect of that?

A. The colors were, as I recall—there were some buyers' cars that were shipped, that were supposed to have been cleaned by the railroad and were not supposed to have been cleaned by us, and the colors on arrival ranged from 4½ [fol. 268] up to 7½ in reds, the contamination being due solely to iron.

Q. The oil was accepted or rejected?

A. Well, that problem was settled by our San Francisco office; I recall they complained on it.

Q. Now, what is your practice and has been over the years in regard to the loading of tank cars at your plants in Berkeley or Oakland with Snowflake oil in connection with the preparation of the cars for loading?

A. Well, the cars are first inspected immediately upon arrival and if they look as if they are too difficult to clean, then we reject them and they are either replaced with a more suitable car or the railroad—it is taken back by the railroad and cleaned by them for further treatment by us.

Q. Now, do you ever load any cars with Snowflake oil without previous cleaning of them by your plant?

A. No; all cars are cleaned.

Q. Now, can you safely ship your cocoanut oil without such cleaning?

A. No, we can't.

Q. And why?

A. They will either be discolored, as in this case, or it

may contain rancid oil that will raise the free fatty acid content above the standard amount.

Q. All right. Now, are you familiar with the process of cleaning your cars at your plant?

[fol. 269] A. Yes.

Q. Will you describe it to the Examiner in detail?

A. As I say, the first step is the inspection and if we see fit to clean them, then, we steam the car out thoroughly to loosen any grease or any material that can be loosened by steam.

Q. Interrupting you for a moment, you used the expression "if we see fit to clean them." Is it optional with you whether you clean them, or do you use that expression "see fit to clean them" if the car is, in your opinion, capable of being cleaned? Is that it?

A. Yes, I use it in that respect. We have rejected quite a few cars.

Q. All right. After they are steamed and cooled down so that the car cleaner can enter the car he washes them down with hot water and rinses them down very thoroughly and then rinses them down with Snowflake coconut oil. He then reinspects the car, goes over it very thoroughly and if no further trace of rust can be seen he then gives it a final rinse with coconut oil and the car is then pushed on the scale ready to be loaded. That oil that has been used in the rinsing goes to a settling tank where all the water is settled out of it. It is then reprocessed and rebleached. It usually takes about, oh, between two and three thousand pounds of oil per tank car to wash it; that is on an average; [fol. 270] some cars take a great deal more; some cars take a little less.

Q. Well, then, having inspected the car and having, what I was going to say, steamed it out, you give it one or more washings with coconut oil, Snowflake coconut oil?

A. Yes.

Q. And in doing so you use approximately two thousand pounds of coconut oil for each car washed?

A. Yes.

Q. And that coconut oil has the effect of cleaning the car and giving it, what I might call a coating, a glass coating so as to make possible the shipment of your Snowflake coconut oil without contamination?

A. It not only does that, but it rinses out any moisture that may be present and makes it thoroughly clean.

Q. All right. Now, then, that has been your practice over all the years that you have been there?

A. Yes.

Q. Now, have you in mind the expense attendant upon those operations?

A. It is $27—I have the list here—it is $27.66 is the approximate figure.

Q. Now, the approximate figure for what?

A. That includes—do you wish what it includes?

Q. Yes; just that approximate figure, $27, may be over a long period, over a short period or may be one car or may [fol. 271] be many cars. I think you ought to explain definitely.

A. That is for the cost of six cars a day, figured on the cost of six cars a day; that is what this cost is figured for.

Exam. Sharp: Is it an average cost?

The Witness: Average cost per car on six cars, cleaning six cars a day.

By Mr. Williamson:

Q. And do you clean six cars a day?

A. Sometimes more.

Q. But over the years six is a fair average of what you clean?

A. Yes.

Q. Now, it might be interesting to the Examiner to know how you arrive at that figure and if you have the details there will you explain them?

A. Well, that includes—general superintendence is $1.50, labor includes two men at 82¢ an hour which comes up to $13.12, air and water we figure at approximately 90¢.

Q. A little more slowly.

A. Air and water we figure at a little more than 90¢. Steam we figure 12,000 pounds at 30¢ a thousand, $3.60; our Snowflake coconut oil we figure 13,440 pounds at 1¢ a pound refining cost which is $134.40; our mechanical department average labor, tools and supplies, $3; our car washing equipment investment and depreciation as $1.52 and then our San Francisco office supervision is $1.32.

Q. Now, those figures which you have given represent [fol. 272] the total cost for the cleaning of six cars?

A. Yes.

Q. And, therefore, the per car cost would be arrived at by dividing by six?

A. Yes.

Q. And in doing so you arrive at the figure that you have stated a few moments ago?

A. Yes.

Exam. Sharp: Well, when I said "average cost" I was thinking you meant $27.66 per car.

The Witness: Yes, that is per car. See, this adds up to——

By Mr. Williamson:

Q. That is what it is, divided by six?

A. Yes.

Exam. Sharp: I didn't understand that was your answer to Mr. Williamson's recent question.

The Witness: That is $159.36, the total for six cars.

Exam. Sharp: All right. Then, the $27.66 per car doesn't mean on any particular day but you consider that to be an average throughout the year?

The Witness: Yes.

Exam. Sharp: Off the record.

(Discussion off the record.)

By Mr. Williamson:

Q. Now, Mr. Gilmore, you spoke of using two thousand [fol. 273] pounds of coconut oil approximately per car or thirteen thousand pounds for six cars and I want to ask you if the figures that you have given do not cover the value of that coconut oil used in the process of cleaning the cars?

A. No.

Q. It only covers the cost to the El Dorado Oil Works of refining or restoring that coconut oil with its contamination derived from car cleaning back to a usable condition, does it not?

A. Yes.

Q. And that is what you speak of when you say one cent refining cost?

A. Yes.

Exam. Sharp: Just a moment, now, please. Off the record.

(Discussion off the record.)

Exam. Sharp: On the record again.

A moment ago we were speaking off the record and you described the last item which was per car instead of per six cars, administrative expense, I believe it was.

Mr. Williamson: The San Francisco office.

The Witness: Yes.

Exam. Sharp: I just want to make sure that the record shows that the item of $1.32 indicated as San Francisco office supervision was an item per car.

[fol. 274] The Witness: Yes.

Exam. Sharp: Instead of per six cars.

The Witness: Yes.

Exam. Sharp: That will make it all right.

By Mr. Williamson:

Q. In your opinion, Mr. Gilmore, is all of the expense that you have detailed necessary in order to properly clean the tank cars for the transportation of Snowflake coconut oil?

A. It is absolutely necessary.

Q. And do you apply that same method of cleaning to all cars in which you ship your Snowflake coconut oil?

A. We may vary the treatment for the more difficult cars. This is more of an average for our average car.

Q. Yes. Well, without interrupting you, these figures that you have given represent the necessary expense incident to the proper cleaning of the average car?

A. Yes.

Q. And that, at least, is the expense that you have to meet in connection with all cars?

A. Yes.

Q. Some cars may require more cleaning?

A. Yes.

Q. And that means more expense?

A. Yes.

Q. But you have not given that figure to the Examiner?

[fol. 275] A. No.

Q. That isn't an average?

A. It is very variable.

Q. Now, I want to show you——

Exam. Sharp: Just one moment.

Mr. Gilmore, do you give this same treatment, cleaning treatment, to the cars that you have under lease as you do to a car that might be furnished upon request of your company to the railroads?

The Witness: Yes, but our cars are usually in much better condition. The cars that are furnished by the railroad usually require more cleaning. As an illustration of that, when we get a rusty car that the railroad has cleaned and allowed to stand it is necessary to soak it with coconut oil and let it stand overnight for the coconut oil to loosen the rust. Then, that oil has to be washed out and washed with acid to remove the iron from it; then, it goes through its normal treatment.

Q. Now, what kind of cars, which class of cars, that is, the leased cars or the ordinary run of cars is it that requires the $27.66 average cost?

A. This is more the average of the lot. Their cars are quite variable and we couldn't say that it comes down to one car.

Exam. Sharp: In reply to Mr. Williamson a few moments ago you said the $27.66 did not include the worst cars.

The Witness: Well, it includes the—the worst cars—it in-
[fol. 276] cludes all the cars but it doesn't represent what the worst cars cost us.

Exam. Sharp: Oh, no, but it is an average, if I understand correctly, of all the cars?

The Witness: Yes.

Exam. Sharp: $27.66 per car?

The Witness: Yes.

Exam. Sharp: Otherwise, the cars that are quite clean will not cost anything like that amount?

The Witness: No.

Exam. Sharp: Whereas, the real rusty ones will cost more?

The Witness: Yes.

Exam. Sharp: That is all right.

By Mr. Williamson:

Q. Now, you mentioned a moment ago the cars from the railroad. You do not mean to convey to the Examiner that

any cars are furnished by the railroad carriers to the El Dorado Oil Works for the transportation of Snowflake coconut oil?

A. Pardon?

Q. No cars are furnished by the railroads for the transportation of coconut oil?

A. No, they aren't. They are cleaned by the railroad, some of them are cleaned by the railroad.

Exam. Sharp: Just a moment right there now.

When you are ready to ship a consignment of coconut oil [fol. 277] whom do you ask for the car?

A. We either—that is our own car or it is supplied by the buyer.

Mr. Williamson: I can make that clear, I think, Mr. Examiner.

By Mr. Williamson:

Q. I was going to ask, all of your oil, of this oil, is shipped in either buyers' cars or your cars which are termed sellers' cars?

A. Yes.

Q. And you get no car from any other source?

A. No; they are either leased by us or supplied by the buyer.

Q. All right. Now, then, the cars that are furnished to you for loading by the buyers are called buyers' cars?

A. Yes.

Q. And they are consigned to the plant either at Berkeley or the Oakland plant?

A. Yes.

Q. And on your sidings?

A. Yes.

Q. And then at that point when they are in proper condition they are loaded?

A. Yes.

Q. Now, when you speak of the cars coming from the railroad you mean the cars that are backed in or switched into your yard by the railroads?

[fol. 278] A. Yes.

Q. And they may be Procter & Gamble cars or Blanton cars or Colgate Palmolive-Peet cars or Lever Bros. cars or any other buyers' cars?

A. Yes.

Q. And those are the ones that you say supposedly have had some cleaning on the part of the railroad before they come to you?

A. Some of them have, yes.

Exam. Sharp: Well, now, I would like to ask why either a leased car or a buyer's car would be subject to the expense of cleaning being borne by the railroads?

Mr. Williamson: Subject to the expense? Well, I think the witness can tell you and Mr. Jeffrys can tell you. I think that the railroad does give them a sort of a cleaning, washing, or something, but not the type of cleaning that we find it necessary to give them in order to prepare them to transport our oil.

Now, I think that we understand at least that the railroads do not in all sections of the country give their cars this superficial or primary cleaning but I understand that they do here generally give them—in the West Coast give them some cleaning.

The Witness: It is the normal type of cleaning.

Mr. Williamson: You ask me why the carriers have to clean them? I don't know.

[fol. 279] Exam. Sharp: I would like to get that in evidence. Why, if the car does not belong to the railroad and you do not order it from the railroad should the railroad make any cleaning at all?

Mr. Williamson: Well, we have made it clear, I believe, that we order no cars from the railroads, railroad cars for the transportation of this Snowflake oil.

The Witness: No.

By Mr. Williamson:

Q. All right. Now, the only cars that you do load are either your own which are called sellers' cars or those furnished by your customers which are called buyers' cars?

A. Yes.

Q. And you do clean all of those cars?

A. Yes.

Q. In the manner you have described?

A. Yes.

Q. Although some of those cars which are spotted for you by the railroad and which are buyers' cars may have received some sort of cleaning at the hands of the railroad companies first?

A. Yes.

Q. Now, the Examiner has asked why the railroad carriers do that cleaning. I assume that you cannot state it any more than I can. I can't state it.

Exam. Sharp: Let the witness answer.

[fol. 280] Mr. Williamson: Yes, if he can.

A. Well, I believe it is in the contract with the buyers' cars that they are to spot them, that the railroad that is to return the car loaded is to clean the car, and then in some cases when we send it back to the railroad for cleaning it has some material in there that we can't clean out. You see, in cleaning the cars, they use caustic soda which is very strong and when they wash it out it produces rust, and unless they get the car back to our tracks within, say, twenty-four hours, why, it is quite rusty and we have to wash it, but it is necessary to have that treatment in case the car has been used for fish oil or Chinese wood oil or some film forming oil prior to our receiving it.

Exam. Sharp: What contract was it you referred to?

The Witness: I believe it is the buyers' cars. I don't know what the contract is in form but I believe that the buyer's car should be cleaned by the railroad prior to our loading it, or may be cleaned by them.

Exam. Sharp: If there is such a contract it is between the——

The Witness: The railroad and the buyer.

Exam. Sharp: The lessee buyer—no, it is between the car owner and the railroad company?

Mr. Williamson: The buyer.

The Witness: Yes.

[fol. 281] Mr. Williamson: No; as I understand the witness, he says that when buyers' cars are delivered to us by the railroads there is a contract between the buyer furnishing the car and the railroad that the railroad will clean the car, spot it at our tracks and return it loaded and under that condition they do clean, give this superficial or first cleaning of the cars which is the question you asked, I understand.

Exam. Sharp: Yes, but that gets right back to an earlier question that I asked. If the car does not belong to the railroad why should the railroad be charged with the expense of cleaning even if it is the buyer's car? Why should there be a contract between the buyer and the railroad for the cleaning by the railroad of those private cars?

Mr. Williamson: Well, I think I can explain, help you a little bit on that.

Exam. Sharp: I would like to have you put that in by a witness in due time, if you will.

Mr. Williamson: I will; I will use Mr. Jeffrys, but in the meantime to just answer the question, these large soap makers who utilize coconut oil and who send forward their cars for loading buy tallow and fats of other kinds and carry them in those cars. Consequently, when the cars come out to the coast for loading they have to be primarily cleaned to remove the residual, if any, of those previous commodities, the commodities previously transported, and, [fol. 282] as I understand it, the carriers are glad to get the haul of the cars and, therefore, they undertake with the buyer who sends the car forward to do this cleaning. It is something that we have nothing whatever to do with and we only know it secondarily and that is what I said that I was not able very clearly to answer your question.

Exam. Sharp: But you will undertake to do that by a witness?

Mr. Williamson: Mr. Jeffrys knows more about it than Mr. Gilmore.

Exam. Sharp: All right.

Mr. Fort: Mr. Examiner, I take it what has been said will not be regarded as evidence in connection with any contract of the type referred to because I know nothing of any contract of that kind and I would object to this evidence which on its face is hearsay or rumor or something of the kind. I would object to its being accepted as having any bearing on any question of any such contract as the one the witness referred to, that is, between the railroads and the buyers.

Exam. Sharp: Well, I believe the witness has not given any information and, of course, what Mr. Williamson says is not evidence.

Mr. Fort: No, the witness has said something about it; I don't know just what. I object to it as evidence on that point.

Mr. Williamson: The witness has said——

Mr. Fort: That he understands there is a contract.

[fol. 283] Mr. Williamson: That he understands the buyers have contracts with the railroad carriers under which the railroad carriers agree to clean the cars. Now, I admit the secondary or hearsay character of that testimony.

I didn't bring it out. The Examiner asked the question and the witness answered it according to his knowledge.

Exam. Sharp: Yes, but the witness really doesn't know.

Mr. Williamson: He is there to tell you anything he knows. I will ask him.

Exam. Sharp: You keep interrupting the witness, Mr. Williamson, on those questions. You keep explaining the witness' testimony. Now, if the witness knows about the contracts, why he can say "yes". If he doesn't know, he can say "no".

Do you know about such a contract?

The Witness: I do not know of any such contract, no.

Exam. Sharp: That will answer that question.

Mr. Williamson: That is the line of questioning that the Examiner opened up and I am glad to give you everything we can.

Exam. Sharp: I thank you. Of course, we want the witness to give the information.

We will take a few minutes recess.

(A short recess was taken.)

[fol. 284] Exam. Sharp: You may proceed.

By Mr. Williamson:

Q. Returning to your figure, Mr. Gilmore, $27.66, do I understand that that is the cost for each car of cleaning?

A. That is the cost for each car.

Q. So that each movement of the car requires a cleaning at that expense?

A. Yes sir.

Q. Now, have you any other samples of oil there? I notice you have. Will you produce them? I will hand you that one. Will you identify that?

A. That is a sample of our Snowflake cocoanut oil containing one per cent of iron.

Exam. Sharp: How is it described?

The Witness: One per cent solution of iron soap in Snowflake type cocoanut oil.

Exam. Sharp: That is the mark on the container?

The Witness: Yes.

Exam. Sharp: Exhibit No. 6 marked for identification.

(Exhibit No. 6, Witness Gilmore, marked for identification.)

By Mr. Williamson:

Q. In other words, one per cent of what you call this iron soap or foreign matter in a unit of coconut oil produced that result, that change in color in the oil?

[fol. 285] A. Yes.

Mr. Fort: Is that one per cent iron soap or one per cent iron?

The Witness: That is one per cent of iron. In all these calculations the percentage is as iron, because the iron soap varies according to the vegetable oils that it is made from.

Exam. Sharp: Now, I notice the exhibit is labeled "One Per Cent Solution Iron Soap in Snowflake Type Coconut Oil".

The Witness: It is calculated as iron; I should add that to the label.

Exam. Sharp: Is the word "soap" a proper part of the label?

The Witness: Well, it is in the form of iron soap.

Mr. Fort: But the percentage is calculated on the iron, not on the iron soap?

The Witness: Yes.

By Mr. Williamson:

Q. In other words, it is iron soap only because with the other components it makes that result?

A. Yes.

Q. Have you another sample of the effect of foreign matter upon coconut oil moved in steel tanks or tanks?

A. Well, this is a sample of coconut oil that has been actually discolored by shipping it in an uncleaned iron [fol. 286] drum, a drum shipped by us and was not cleaned and this is the actual result. It is a sample received from Grace & Company in Central America.

Q. That is a shipment of your oil which was made in a steel drum?

A. Yes.

Q. For Grace & Company to Central America which drum was not cleaned and the result was the discoloration shown in that exhibit?

A. Yes.

Mr. Williamson: I believe that is No. 7, is it?

Exam. Sharp: It will be identified as Exhibit No. 7.

(Exhibit No. 7, Witness Gilmore, marked for identification.)

By Mr. Williamson:

Q. Now, Mr. Gilmore, the effects that you have described as to discoloration and an increase of acid and so on are in your testimony limited to coconut oil? In other words, your statements for the Examiner this morning have been directed and have been limited to coconut oil? You have not dealt with any other brand of oil?

A. No. The coconut——

Q. Now, is, in your opinion, coconut oil subject to a different classification with respect to color and acids from [fol. 287] other oils?

A. Yes, it is.

Q. Will you explain that?

Exam. Sharp: Just a minute, Mr. Williamson. Will you let him answer? He started to answer the question "no". I believe the way the question is put "no" is not a complete answer.

Will you read Mr. Williamson's previous question?

(The question referred to was read by the reporter as follows:

By Mr. Williamson:

"Q. Now, Mr. Gilmore, the effects that you have described as to discoloration and an increase of acid and so on are in your testimony limited to coconut oil? In other words, your statements for the Examiner this morning have been directed and have been limited to coconut oil? You have not dealt with any other brand of oil?

"A. No. The coconut ——")

Exam. Sharp: That is sufficient.

Answer that question, please, completely.

The Witness: Well, most other oils are not sold with such a high color specification that we have, or such a good color specification. As a consequence, they may not require [fol. 288] the same treatment and, in addition, coconut oil is a much better solvent for iron than many other vegetable oils. Linseed oil is not nearly as affected by iron as coconut oil is.

Exam. Sharp: That is sufficient.

Mr. Williamson: I was trying to develop that classification which the witness has now developed himself.

I think that is all, Mr. Examiner.

Exam. Sharp: Any cross examination?

Cross-examination.

By Mr. Fort:

Q. Mr. Gilmore, what do you ship aside from this Snowflake oil?

A. We ship Linseed oil from our Berkeley plant on special order. On special order we have shipped certain special grades of coconut oil with different color specifications.

Q. I am talking now about this period 1934, '35 and '36. All my questions shall be directed to that period unless I expressly state they cover some other period. Is your answer directed to that period also?

A. Yes. At that period I believe we also shipped some hempseed oil.

Q. Did you ship only coconut oil in your so-called leased cars?

Mr. Williamson: Did you say "shipped in your so-called leased cars"?

[fol. 289] Mr. Fort: Yes.

A. Yes, I believe we did.

By Mr. Fort:

Q. You shipped no other kind of oil in your leased cars except coconut oil?

A. I don't recall any other types of oils.

Q. Is all of your coconut oil Snowflake?

A. No.

Q. What other coconut oil do you ship?

A. We also ship our Super Cochin grade that I mentioned before of which this is a sample.

Q. Do you ship any other except those two grades?

Exam. Sharp: Now, just a moment, when he said "of which this a sample", are you going to offer that as an exhibit?

Mr. Williamson: I will; if Mr. Fort doesn't want to, we will.

Exam. Sharpe: Well, if he speaks about this we have to——

Mr. Williamson: Yes, I noticed that. We would ask it to go in as Exhibit 8.

Exam. Sharp: The bottle containing oil and labeled "Coconut Oil, Type Super Cochin, Color 5 Y——

Mr. Williamson: Five yellows, that is.

Exam. Sharpe: And O. 5 R——

Mr. Williamson: Red.

[fol. 290] Exam. Sharp: Will be marked as Exhibit No. 8.

(Exhibit 8, Witness Gilmore, marked for identification.)

By Mr. Fort:

Q. Are they the only grades of coconut oil that you ship?

A. No; we have shipped some other special grades. There was another one that I recall that was made especially for the Gordon & Allen Soap Company; that was 10 yellows and 1 red and less than 6 per cent of free fatty acid.

Mr. Williamson: That was not shipped in interstate commerce, though?

The Witness: No.

Mr. Williamson: That was just shipped, delivered in Oakland?

The Witness: Yes.

By Mr. Fort:

Q. Was that shipped in your leased cars?

A. Yes.

Q. And was there any other grade that you made?

A. Those are all that I recall.

Q. Now, do you ship your Snowflake sometimes in the buyers' cars?

A. Yes.

Q. And do you ship your other grades of coconut oil sometimes in the buyers' cars?

A. At that time I believe we did.

[fol. 291] Q. Did you give the buyers' cars this special preparation to which you have testified?

A. Yes sir.

Q. You received no mileage allowance on those buyers' cars, did you, Mr. Gilmore?

A. I can't testify to that.

Q. You are not at all familiar with the so-called leased car situation?

A. I am from just what we hear over at the mill. That would be handled by another witness.

Q. As I understood your testimony, or part of it, it is to the general effect that you ship a highly specialized product different from most other or all other products?

A. Yes sir.

Q. Different from the products shipped by other people?

A. Yes.

Q. And that that requires a special preparation in the car, is that correct?

A. Yes.

Q. Now, with respect to your cost of cleaning, some twenty-seven dollars was the cost you gave, wasn't it?

A. Yes sir.

Q. That is a cost which you estimated with respect to all cars, buyers' cars and leased cars?

[fol. 292] A. Yes, that includes all cars.

Q. And I understood you to say, I think, that the cost in connection with buyers' cars was greater than the cost with respect to the leased car?

A. Yes.

Q. You, however, made no distinction in your estimates?

A. No.

Q. Now, these so-called estimates were not figures which you calculated from actual experience, as I understand it, but rather figures which you estimated as an abstraction, is that correct?

A. No; they are figures that we actually have at the plant; by that I mean we have two men, our washers, on every day.

Q. And the others are figures charged up to the car shipping department?

A. Yes.

Q. But did you take a given period, for example, this period '34, '35 and '36 and take your actual costs with respect to each of these items entering into your estimate, the number of cars cleaned during the period and make your calculation to get an average actual cost during that period? If so, I should like to see your underlying figures.

A. No, we couldn't separate the figures at that time because we had shipments in drums and in other containers, [fol. 293] so that it was impossible to segregate the figures.

Q. And these men who worked there were loading linseed oil and cleaning cars for linseed oil, too, I assume?

A. The linseed oil cars required practically no cleaning.

Q. Well, at any rate these figures were not those actual figures for the reason you have given?

A. Yes.

Q. Now, I couldn't understand your figures very clearly as you read them, but did I understand that of two supervision charges there one was a San Francisco supervision of $1.32 per car——

A. Yes.

Exam. Sharp: Wait a minute. Now, what is the other one?

The Witness: The other was the mill.

Exam. Sharp: Just a minute. Let him finish his question.

By Mr. Fort:

Q. A so-called San Francisco supervision cost of $1.32 a car, is that correct?

A. Yes, that is correct.

Q. And then there was an additional supervision cost which you gave in a unit of 6 cars, I believe?

A. Yes.

Q. What was that?

[fol. 294] A. $1.50.

Q. What did you have in your San Francisco supervision?

A. That will be covered by our other witness. He can tell you what that is.

Q. These estimates were then made up by someone other than you?

A. That estimate was, yes. That is an additional estimate on to the mill office estimate.

Q. So that so far as that is concerned you don't know anything about that?

A. No.

Q. Are there any other items there that you don't know anything about?

A. No.

Q. The rest were made by you?

A. They were made by people associated with me.

Q. Well, what did you have to do with them, Mr. Gilmore?

A. Well, I supplied some of the information, but I was back in Omaha for part of the time when this was finally

made up. I supplied the basic—some of the basic information for it.

Mr. Fort: On the basis of the testimony developed on cross-examination I move to strike the estimate from the record as not being within the knowledge of the witness. [fol. 295] Mr. Williamson: The witness has said that most of it was made up from his own estimates. He has excepted only one item; that was made up from the San Francisco office, he said.

Exam. Sharp: Well, I think it will speak for itself and the objection will be overruled.

By Mr. Fort:

Q. When you run coconut oil through your cars in the course of this special preparation which you found it desirable to give your cars it becomes contaminated in some cases with rust particles, does it?

A. Yes, it does.

Q. What do you do with that oil later?

A. For the material that is very badly contaminated with rust it is necessary to transport it to our Berkeley mill from Oakland and to wash it with sulphuric acid. That dissolves the iron rust. Where it is not seriously contaminated, why, we can process with caustic soda and rebleach.

Q. Then what do you do with oil as so reconditioned?

A. We put it back into our general run of oil.

Q. And that becomes Snowflake?

A. Yes. It is first necessary to settle out all the water, of course, in either case.

Q. Do you deal with the railroads yourself, Mr. Gilmore, in connection with these cars, or the cleaning of the cars? [fol. 296] A. Only in so far as—when it either comes to accepting or rejecting them.

Q. You mean a car that is placed for you?

A. When a car is spotted on our tracks and it is found unsuitable for cleaning, why, then, I may reject it.

Q. Now, in your leased cars they carry nothing but coconut oil, don't they?

A. Yes.

Q. And that makes those cars in a better condition generally for reloading than if they had been loaded with some other commodity?

A. From an iron rust standpoint, it does, yes.

Q. Well, are there any other standpoints?

A. Yes, the free fatty acid.

Q. From that standpoint what happens?

A. From that standpoint they still have to take—they still require considerable cleaning. All the old oil has to be washed out. The soap companies leave a certain amount of water in the cars and coconut oil and water will react and form free fatty acid.

Q. But from the point of view of the oxide or iron those cars that have been loaded with coconut and have come back to you are in better shape than cars of the other kind?

A. Usually they are, yes. Occasionally they do come back in poor condition.

[fol. 297] Q. After you load with coconut oil and ship to a buyer that car is returned empty to you without reloading on the part of the railroad, or was during this period?

A. Yes.

Q. The railroads serving you in San Francisco clean these cars, both the buyers' cars and your leased cars when you request them to do so, don't they, Mr. Gilmore?

The Witness: Would you repeat the question?

Mr. Fort: Read the question, please?

(The question referred to was read by the reporter.)

A. Yes, they do.

By Mr. Fort:

Q. And what is the nature of the cleaning that the railroads give those cars when you request them to clean them, if you know? If you don't know, I don't want you to guess about it.

A. I do know that they use a strong caustic wash on them, and that is their final wash, or it is their final cleaning wash. They probably rinsed them down with water. By the time they reach us they have a layer of very fine fresh rust.

Q. The railroad uses caustic soda and steam to clean the cars, doesn't it?

A. I wouldn't say "caustic soda". It is a strong caustic wash. There are other things than caustic soda that are used for cleaning solutions.

[fol. 298] Q. Some clean with live steam?

A. I imagine so; I can't say; I haven't seen them clean them.

Q. Yes, and then they wipe the cars down with coconut oil that you send over to them for that purpose, do they?

A. No; they have done it on a few cases where we supplied the coconut oil, but we couldn't supply sufficient coconut oil without their buying the oil and they refused to buy the oil.

Q. Whenever you asked them to do it and supplied the coconut oil they rubbed it down with coconut oil; didn't they?

A. Yes, they did.

Q. And then sent the car back to you?

A. Yes.

Q. Now, what was the reason you wanted that car wiped down by the railroad with coconut oil?

A. Because it wouldn't rust in between the time they finished washing it and the time we received it.

Q. Yes. Now, when that car came over to your truck what did you do with it then? Did you still feel it was necessary for you to make a special preparation for your special commodity?

A. We still had to give it the same wash because of this layer of coconut oil that we had supplied them. There was a certain—when they rubbed it down, why, there was a [fol. 299] certain amount of strong caustic, whatever they used next to the iron, and the coconut oil was dirty from that material that they used and it was necessary to wash all that oil out and rinse it down again with fresh oil.

Q. And rinse it down with what?

A. Fresh oil.

Q. Now, did you use as much fresh oil under those circumstances as you would otherwise?

A. It depended to a certain extent on the car. Some of the cars, where they had been used for fish oil, where the preceding oil would get into the seams it would gradually seep out and in that case it was necessary to use more oil.

Q. In that case that would not be one of your leased cars of the kind involved in this proceeding, would it?

A. No.

Q. Because you didn't ship fish oil in your leased cars?

A. No.

Q. Well, I am talking about your leased cars, and I will be talking about those unless I say I am talking about some-

thing else. Take your leased car that has been loaded with coconut oil and given this cleaning by the railroad at your request——

A. They have not been cleaned by the railroad at our request unless they have been treated in some other way in between the time we had gotten it, I mean, the time we had shipped it and the time we had received it back.

[fol. 300] Q. Ordinarily you didn't request the railroad to clean?

A. No; we just request the railroad to clean when the car is exceptionally dirty or has in that respect, I mean, some sort of a material that we have great difficulty removing.

Q. Otherwise, you wished to undertake the preparation yourself?

A. Yes.

Q. On that cleaning which the railroads did for you when you asked it you paid nothing in addition for that cleaning, did you, Mr. Gilmore?

A. I can't say.

Mr. Fort: I think that is all.

By Mr. Matthew:

Q. Does your company ship any crude coconut oil or did it make any such shipments during the years 1934 to 1936?

A. I believe this is all classed as crude coconut oil. It would be for the other witness to develop that, though, its exact classification.

Q. Well, I understood you——

A. By "crude" I mean discolored, I mean of a different grade or color.

Q. Well, I understood you to distinguish between your mill refined Snowflake oil, as you termed it, and Super Cochin type on the one hand, and the so-called Manila oil on the other?

A. Yes.

[fol. 301] Q. Well, Manila oil was a term which you explained was virtually an alternative for the term crude coconut oil.

A. I don't believe you can apply the term crude coconut oil to it, no.

Q. Well, what is the distinction between the so-called Manila type oil and the crude coconut oil?

A. I believe they are all, for rate purposes, I believe they are all classed the same, but I can't—I would rather have another witness develop that.

Q. Well, I am not interested in the classification for rate purposes. I am just asking you as a chemist and one familiar with these oils what they are.

A. Well, the only difference to me is the difference in color and acid. That they are crude in that sense doesn't mean anything. One is dark colored and maybe high acid, where the other is light colored and has a standard acid content.

Q. Then, are we to understand that all of these shipments of oil made by your company in leased cars during 1934-1936 period were of the Snowflake or Super Cochin types?

A. That is my recollection.

Q. Well, it is merely a recollection, then?

A. Well, as I say, there were one or two other special grades like that that didn't enter into interstate commerce. [fol. 302] Q. All right. Now, just a question or two further about the railroad cleaning. You stated that in some instances cars as cleaned by the rail carriers, were tendered your company and upon inspection it was found they had been unsatisfactorily cleaned and, therefore, returned to the rail carriers for further cleaning.

A. We have returned them, yes.

Q. And in such instances have the rail carriers further cleaned them?

A. They have further cleaned them, but in most cases it didn't do much good unless we sent oil along with it to be wiped so that they could rub it down.

Q. Yes. But when you did send the oil to them they did in fact rub the interior of the car down with the oil?

A. Yes.

Q. And did the rail carriers at any time refuse to clean these cars for you upon your request?

A. Not to my recollection.

Q. Was your company shipping coconut oil from the Oakland plant in the period 1934 to 1936?

A. No. We shipped some from storage at Oakland that had been made at Berkeley. The oil had been first made at Berkeley and had been stored at Oakland.

Q. Well, when did you first begin to ship oil from your Oakland plant?

[fol. 303] A. I believe it was in 1937.

Q. And may it not have been as late as 1938?

A. Early in 1938; I believe it was in the fall; it was in October or November of 1937.

Q. All right.

A. We made a few shipments from Oakland.

Q. All right. Then, it must have been true that during the contract period here involved, 1934 to 1936, inclusive, virtually all of your shipments were being made from your Berkeley plant?

A. Yes.

Q. Can you tell us approximately in what proportion you shipped your oils or did ship your oils during this period in the so-called leased cars and in the so-called buyers' cars respectively?

A. No, I couldn't give you that information.

Q. Well, do you know whether the greater proportion were shipments——

Mr. Williamson: If you want to know the exact fact we will put Mr. Jeffrys on to give it to you.

Mr. Matthews: All right, I won't press the question of this witness. I think this is all I have of this witness.

Redirect examination.

By Mr. Williamson:

Q. Mr. Gilmore, what charge have you included in your [fol. 304] charges there for the refining of oil used in cleaning the cars?

A. I have a charge of 1 cent per pound, and it amounts to $134.40.

Q. For 13,440 pounds, then?

A. Yes, 13,440.

Q. All right. As a chemist are you able to state whether that is the usual or ordinary charge for refining?

A. That would be an average charge. As I say, some oils may require more than that. Yes, that would be.

Q. But that is a fair ordinary charge for refining costs?

A. Yes.

Q. Now, these cars that you ask the railroad to clean, I don't think the record is entirely clear on those as to that. Is your testimony as to requesting the railroads to clean cars limited to cars that have come to you for loading from buyers, so-called buyers' cars?

A. Do you mean that we have sent—whether we have sent sellers' cars to them or not?

Q. Yes. I want to know what cars you asked the railroad companies to clean.

A. Well, by far the greater majority are the buyers' cars. There have been a few of our cars that have been very rusty that have been returned to the railroad for cleaning, but they have been very, very few.

[fol. 305] Exam. Sharp: Why would you return those cars to the railroads if they were your own cars?

The Witness: They had been allowed to stand for quite a while and probably when the soap company unloaded them they had steamed them out and gotten every bit of oil out and they had rusted in between.

Exam. Sharp: Who had steamed them?

The Witness: The soap companies to whom we shipped them, and when they unloaded the cars they steamed them out after most of the oil was out to get the last drop of oil, steamed them and wiped them out, in which case there was not a protective film of oil, and there would be a small amount of water in there, and they would rust.

Exam. Sharp: But would any action of the carrier have intervened to cause any extra damage to the car?

The Witness: There have been cases where the car has been in bad order, where it has gone to the railroad and been repaired and required a cleaning before it was returned.

Exam. Sharp: Well, generally?

The Witness: That is the only case that I can cite; otherwise no, the railroad, there has been nothing that they have done that required recleaning.

By Mr. Williamson:

Q. Now, with reference to these buyers' cars that you have asked the railroads to clean, if they came back in [fol. 306] perfectly or inadequately cleaned would you accept them?

A. On some occasions if we thought we could finish cleaning we have accepted them; on other occasions we have sent them back to the railroad to be cleaned the second time.

Q. And do you know whether the buyers have furnished other cars in those instances?

A. In some instances, they have.

Q. Mr. Fort asked you whether the figures that you had made up were merely estimates or whether they were actual figures, computations. Now, as I understood your testimony, you said that those figures were for the charges, but you couldn't state from actual knowledge that those were actual figures as to the period of time before you made the setup, the figure setup, is that correct?

A. Yes. Well, our cost accounting system at that time didn't allow for a complete breakdown.

Q. And when did this cost accounting system change so that you could make a breakdown?

A. When we moved to Oakland.

Q. So, I take it, that the figures that you have summitted are actual figures as of the period subsequent to your moving to Oakland?

A. Yes.

Q. And do you know of any reason why they wouldn't [Fol. 307] be equally applicable to the movement of cars, of the cleaning of cars prior to the time that you moved to Oakland?

Mr. Matthew: I object to the form of that question, Mr. Examiner. There isn't any reason why they should be ——

Mr. Williamson: He can state that. He knows.

Mr. Matthew: Well, I think that if counsel wants to ask ——

Exam. Sharp: Objection sustained. Reask the question, please.

By Mr. Williamson:

Q. Do the figures that you have given, in your opinion, fairly represent the costs of the El Dorado Oil Works of cleaning the cars during the period from 1934 to 1936 inclusive at the Berkeley plant?

A. Yes, they do.

Q. Your attention was directed to Super Cochin type of oil. That is a more refined type of oil even than the Snowflake, is it not?

A. Very much so, yes, it is.

Q. Is it more or less subject to contamination?

A. It is more subject to contamination because it is so very light; it shows contamination much more readily.

Mr. Williamson: That is all.

Exam. Sharp: I had one question:

Is the oil that has been introduced here as Exhibit No. 2 the product that results immediately from the first crushing of copra?

[fol. 308] The Witness: Is that the Manila grade?

Exam. Sharp: Yes.

The Witness: Yes, that is it, after the first crushing and the first filtration and there has been no further processing on it.

Exam. Sharp: Well, then, I understood you to say that even the No. 1 Exhibit known as Snowflake was still regarded by you as crude?

The Witness: Yes.

Exam. Sharp: Coconut oil?

The Witness: Yes.

Exam. Sharp: But it has been, nevertheless, subjected to somewhat of a process of refinement?

The Witness: Yes, it has been bleached further. We have added bleaching agents to the Manila grade in order to lighten the color.

Exam. Sharp: That is all.

Are there any further questions of Mr. Gilmore.

(No response.)

If not, you are excused.

(Witness excused.)

We will adjourn until 2:00 o'clock.

(At 12:30 p. m. a recess was taken until 2:00.)

[fol. 309] Afternoon Session

2:00 P. M.

Exam. Sharp: The hearing will come to order.

You may call your next witness, Mr. Williamson.

Stipulation as to Tariffs

Mr. Williamson: Yes, I would like to cover one or two propositions which, I think, in the interests of an economy of time we can cover by a stipulation.

I wanted to ask Mr. Fort and Mr. Matthew, who are appearing as counsel, to stipulate into the record the tariffs, railroad tariffs, applicable to the period in question and

they are the ones, Mr. Matthew, that were in the civil action and which are set forth in your transcript of record in the Supreme Court which I will leave the reporter, if need be, to copy into the record for the purposes of the record.

The mileage provisions, Item No. 70, Rule 1, effective May 15, 1934, mileage tariff No. 7-I I. C. C. No. 2692 would be the first one.

Exam. Sharp: Just one moment.

Are you willing to do that, Mr. Matthew?

Mr. Matthew: Yes, I would be willing to so stipulate with a suggestion just a little later, if I may make it.

Mr. Williamson: Well, does it affect the stipulation?

Mr. Matthew: No; I was going to suggest in this respect, of course, the tariff items which are set forth in that record, do not cover the entire period embraced by the contract so I [fol. 310] was going to suggest as a slight amendment, if it be an amendment, that the succeeding tariffs throughout the period covered by——

Mr. Williamson: Well, I am offering them one at a time so that I would cover all that we have in the record and if you have anything additional you can do it; you can introduce it, but I have got to introduce them one at a time.

Exam. Sharp: Well, I thought you said you would give it to the reporter to copy so we could save time.

Mr. Williamson: I will, but I was giving the reference for Mr. Matthew's information so he would know to what I referred.

Exam. Sharp: Well, I assume that Mr. Matthew has a copy of that brief.

Mr. Williamson: He has; it is his record.

Mr. Matthew: And Mr. Williamson's. I am perfectly agreeable to stipulating those tariffs into the record, no objection at all.

Mr. Williamson: All right, then. Miss Reporter——

Exam. Sharp: Now, just one moment. Off the record.

(Discussion off the record.)

Exam. Sharp: On the record, Miss Reporter.

Now, go ahead.

Mr. Williamson: The first of them is the one on page 192 of the Supreme Court Record in the case of General Ameri- [fol. 311] can Tank Car Corporation, petitioner, versus El Dorado Terminal Company.

The second one effective August 1, 1934, is on page 193 of the record.

The third one is on page 194 extending over to the top of page 195.

The next one is on page 195 extending over to page 196.

The next one begins on page 196 commencing with effective date November 1st, 1934, and extends to the middle of page 197.

The next one, effective date April 1st, 1935, is at the foot of page 197 and extends over to page 198.

The next one, Mr. Matthew, is August 29, 1935, on pages 199 and 200.

The next one is January 15, 1936, on page 200 and extends over onto the middle of page 201.

Mr. Fort, are you agreeable to those?

Mr. Fort: I take it that these tariff provisions to which you refer provide for the payment of mileage for the use of tank cars?

Mr. Williamson: Yes.

Mr. Fort: And they are all from the so-called Jones series of tariffs, are they?

Mr. Williamson: They were all associated tariffs.

Mr. Fort: Association of American Railroads?

Mr. Williamson: I don't know whether it is the Jones [fol. 312] Mr. Jeffrys tells me that they are the Jones ones. I know the name Kipp is used in some of them and I was not sure.

Mr. Fort: We are willing, Mr. Examiner, to stipulate the pertinent tariff items in the association tariffs effective during the period January, 1934, through December, 1936, having to do with the mileage payments for tank cars and we have no objection to this record being copied into our record here, although, I don't know what is in this record, but the point I mean to make is that those official tariffs as on file with the Commission may be referred to as a check against anything so copied into the record.

In other words, I would be perfectly willing to stipulate the tariffs as filed with the Commission, the appropriate items of those tariffs, but I don't know whether this is a true copy or whether it includes all the items or anything of that kind.

Mr. Williamson: I think Mr. Matthew does know because he made it up. He stipulated to it at the time.

Exam. Sharp: It will be understood that the tariffs themselves will be used for any consultation that will be necessary.

Mr. Williamson: If there should be any point of difference we will be glad to concur in any correction that is made. The only thing we would ever ask is that you advise us if there is any point of difference so that we may know.

Mr. Fort: I have no reason to think there is.

Mr. Williamson: The record of these mileage allowances [fol. 313] were made up by Mr. Matthew and one of my associates who went over the record with the railroad people and put it in order, as I understand it.

Mr. Fort: Mr. Williamson, does that cover the full period through December, '36?

Mr. Williamson: I am going to ask Mr. Matthew whether he knows. I believe that there was no change after January, 1936.

Mr. Matthew: I am advised by my associate that he has checked the tariffs and such is the fact and specifically that this tariff to which counsel has just referred, the one which took effect January 15, 1936, continued in effect without change until the end of that year and somewhat beyond. Subject to any possible error I think we could all so understand for the purposes of the record; it would be agreeable to me, in any event.

Mr. Williamson: I am going to ask you also in the interest of the saving of time if you will stipulate that during all of this period in question, from January 1, 1934, to December 31, 1936, the Transcontinental Freight Bureau, Eastbound Tariff No. 3-G, Item No. 404, Section 1, effective October 1st, 1933, reads as follows:

"Rates provided for freight in tank cars do not obligate the carriers to furnish tank cars."

Mr. Fort: I am willing to stipulate that the tariff so provides subject to check against the actual tariff and also [fol. 314] with the further understanding that if there should be any other provisions in the actual tariff bearing upon that matter, bearing upon the language to which Mr. Williamson calls attention, that that also may be referred to by any party as a part of the record.

Mr. Williamson: It is agreeable to me.

Mr. Matthews: Satisfactory.

Mr. Williamson: I have no reason to think there was any change. It was stipulated before that these were effective throughout and I imagine that that is the fact.

I will leave this with you, Miss Reporter.

Exam. Sharp: Make a note, Miss Reporter, to copy from the document at this juncture in the proceeding.

All items reproduced below are or were published in Mileage Tariffs of the American Railway Association Tariff Bureau, B. T. Jones, Agent.

The rules reproduced below are all headed by a notation reading as follows:

(Applies only on tank cars of private ownership.)

Item No. 70, Rule 1.
Effective May 15, 1934.
Mileage Tariff No. 7-I, I. C. C. No. 2692.

[fol. 315]

Item No.	Rule No.	RULES
		PAYMENT OF MILEAGE
70	1	(a) Mileage for the use of cars of private ownership will be paid to the car owner or to the party who has acquired the car or cars, as shown by the permanent reporting marks (see Note) for loaded and empty movement, provided cars are properly equipped and marked with the name of the owner or lessee and proper reporting marks or initials and car number.
		(b) Mileage will be paid to the car owner by other than the lessee on cars leased to or rented outright by a railroad company until the cars have been re-marked with the name and the proper reporting marks of the lessee railroad company.
		(Page 1)
		Note.—Acquirement or ownership will be identified by the permanent reporting marks painted or stenciled on the body of the car. When reporting mileage allowances, the carding, placarding or boarding of cars will not be recog-

nized as evidencing their acquirement or ownership. To avaid confusion incidental to similarity of initials, car owners should obtain assigned reporting marks from the Transportation Division of the American Railway Association.

[fol. 316] Item No. 70-A (Cancels 70), Rule No. 1.
Effective October 1, 1934.
Mileage Tariff No. 7-I, I. C. C. No. 2692, Supplement No. 1.

Item No.	Rule No.	RULES

PAYMENT OF MILEAGE

(10) 70-A Cancels 70 — 1 — † (a) Mileage for the use of cars of private ownership will be paid for loaded and empty movement to the car owner or to the party who has acquired the car or cars, provided cars are properly equipped and marked with the assigned reporting marks (see Note), and car number and provided, further, that the marked capacities and assigned reporting marks are properly published in the Official Railway Equipment Register I. C. C.-R. E. R., No. 241, issued by G. P. Conard, Agent, and the gallonage capacities in Circular 6-V, I. C. C. A-2297, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof.

(b) Mileage will be paid to the car owner by other than the lessee on cars leased to or rented outright by a railroad company until the cars have been re-marked with the name and the proper reporting marks of the lessee railroad company.

Note.—Acquirement or ownership will be identified by the assigned reporting marks [fol. 317] painted or stenciled on the body of the car. Car owners must obtain such reporting marks from the Transportation Division of the American.

(10) Effective October 1, 1934.

(Page 2)

Railway Association. When reporting mileage allowances, the carding, placarding or boarding of cars will not be recognized as evidencing their acquirement or ownership.

† Increase.

* Denotes changes in wording which result in neither increases nor reductions.

Item No. 70 (Parcels 70 and 70-A), Rule No. 1.
Effective October 1, 1934.
Mileage Tariff No. 7-I, I. C. C. No. 2692, Supplement No. 2.

Item No.	Rule No.	RULES
		PAYMENT OF MILEAGE
(19) 70-B		† (a) Mileage for the use of cars of private ownership will be paid for loaded and empty movement to the car owner or to the party who has acquired the car or cars, provided cars are [fol. 318] properly equipped and marked with the assigned reporting marks (see Note), and car number and provided, further, that the marked capacities and assigned reporting marks are properly published in the Official Railway Equipment Register I. C. C.—R. E. R. No. 241, issued by G. P. Conard, Agent, and the gallonage capacities in Circular 6-V, I. C. C. A-2297, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof, except that the gallonage capacities of cars, designed and used exclusively for handling of commodities on which weights and charges are arrived at by weight and not by gallonage capacity of cars, need not be published in Circular No. 6-V, I. C. C. No. A-2297,

Item No.	Rule No.	RULES
Cancels 1 70 and 70-A		issued by L. E. Kipp, Agent, supplements thereto or reissues thereof.
		(b) Mileage will be paid to the car owner by other than the lessee on cars leased to or rented outright by a railroad company until the cars have been re-marked with the name and the proper reporting marks of the lessee railroad company.
		Note.—Acquirement or ownership will be identified by the assigned reporting marks painted or stenciled on the body of the car. Car owners must obtain such reporting marks from [fol. 319] the Transportation Division of the American Railway Association. When reporting mileage allowances, the carding, placarding or boarding of cars will not be recognized as evidencing their acquirement or ownership.

† Increase.

(10) Effective October 1, 1934. Issued on one day's notice under special permission of the Interstate Commerce Commission No. 139062 of September 26, 1934.

(Page 3)

Item No. 70-C (Cancels 70-B), Rule No. 1.
Effective November 1, 1934.
Mileage Tariff No. 7-I, I. C. C. No. 2692, Supplement No. 3.

PAYMENT OF MILEAGE

† (a) Mileage for the use of cars of private ownership will be paid for loaded and empty movements only to the car owner—not to a lessee—provided cars are properly equipped and

Item No.	Rule No.	RULES
		marked with the assigned reporting marks (see Note), and car number and provided, further, [fol. 320] that the marked capacities, lengths, cubical capacities and assigned reporting marks are properly published in the Official Railway Equipment Register, I. C. C.—R. E. R. No. 241, issued by G. P. Conard, Agent, and the gallonage capacities in Circular 6-V, I. C. C., No. A-2297, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof, except that the gallonage capacities of cars, designed and used exclusively for handling of commodities on which weights and charges are arrived at by weight and not by gallonage capacity of cars, need not be published in Circular No. 6-V, I. C. C. No. A-2297, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof.
(3) 70-C Cancels 70-B	1	(b) Mileage will be paid to the car owner by other than the lessee on cars leased to or rented outright by a railroad company until the cars have been remarked with the name and the proper reporting marks of the lessee railroad company.
		† Note.—Ownership will be identified by the assigned reporting marks painted or stenciled on the body of the car. Car owners must obtain such reporting marks from the Transportation Division of the American Railway Association. When reporting mileage allowances, the cardings, placarding or boardings of cars will not be recognized as evidencing their ownership.
		[fol. 321] † Denotes changes in wording which result in neither increases nor reductions.
		(43) Effective November 1, 1934.

Item No. 70-D, (Cancels 70-C and 70-B), Rule No. 1.
Effective November 1, 1934.
Mileage Tariff No. 7-I, I. C. C. No. 2692, Supplement No. 5.

Item No.	Rule No.	RULES

PAYMENT OF MILEAGE

(a) Mileage for the use of cars of private ownership will be paid for loaded and empty movement to the car owner or to the party who has acquired the car or cars, provided cars are properly equipped and marked with the assigned reporting marks (see Note), and car number used provided, further, that the marked capacities and assigned reporting marks are properly published in the Official Railway Equipment Register I. C. C.—R. E. R. No. 241, issued by G. P. Conard, Agent, and the gallonage capacities in Circular 6-V, I. C. C. A-2297, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof, except that the gallonage capacities of cars, designed [fol. 322] and used exclusively for handling of commodities on which weights and charges are arrived at by weight and not by gallonage capacity of cars, need not be published in Circular No. 6-V, I. C. C. No. A-2297, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof.

(4) 70-D Cancels 70-C and 70-B

(b) Mileage will be paid to the car owner by other than the lessee on cars leased to or rented outright by a railroad company until the cars have been remarked with the name and the proper reporting marks of the lessee railroad company.

Note.—Acquirement or ownership will be identified by the assigned reporting marks painted or stenciled on the body of the car. Car owners must obtain such reporting marks from the Transportation Division of the American Railway Association. When reporting mileage

allowances, the carding, placarding or boarding of cars will not be recognized as evidencing their acquirement or ownership.

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(4) Effective November 1, 1934. Issued on one day's notice under special permission of the Interstate Commerce Commission No. 139872 of October 29, 1934.

(Page 5)

[fol. 323]

Item No. 70-E (Cancels 70-D), Rule No. 1.
Effective April 1, 1935.
Mileage Tariff No. 7-I, I. C. C. No. 2692, Supplement No. 7.

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(67)

Item No.	Rule No.	RULES

PAYMENT OF MILEAGE

(a) Mileage for the use of cars of private ownership will be paid for loaded and empty movements only to the car owner—not to a lessee—provided cars are properly equipped and marked with the assigned reporting marks and car number and provided, further, that the marked capacities and assigned reporting marks are properly published in the Official Railway Equipment Register I. C. C.—R. E. R. No. 241, issued by G. P. Conard, Agent, and the gallonage capacities in Freight Tariff 300, I. C. C. No. A2518, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof, except that the gallonage capacities of cars, designed and used exclusively for handling of commodities on which weights and charges are arrived at by weight and not by gallonage capacity of cars, need not

70-E Cancels 70-D

be published in Freight Tariff 300, I. C. C. No. A-2518, issued by L. E. Kipp, Agent, supple-

[fol. 324]

ments thereto or reissues thereof.

(b) Reporting marks will be assigned to car owners, only, by the Secretary, Transportation

Division, Association of American Railroads, upon written application. Such marks may be used, also, on cars operated but not owned by the party to whom the marks are assigned, and, when so used, such cars and the name and address of the owner, to whom the mileage will be paid, must be shown by the assignee in his registration in the Official Railway Equipment Register, I. C. C.—R. E. R. No. 241, issued by G. P. Conard, Agent, supplements thereto or reissues thereof.

(c) Assigned reporting marks must be painted or stenciled on the body of the car. When reporting mileage allowances, the carding, placarding or boarding of cars will not be recognized.

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† Denotes changes in wording which result in neither increases nor reductions.

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[fol. 325]
Item No. 100, Rule 1.
Effective August 29, 1935.
Mileage Tariff No. 7-J, I. C. C. No. 2791.

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(68)

PAYMENT OF MILEAGE

(a) Mileage for the use of cars of private ownership will be paid for loaded and empty movements only to the car owner—not to a lessee—provided cars are properly equipped and marked with the assigned reporting marks and car number and provided, further, that the marked capacities, and assigned reporting marks are properly published in the Official Railway Equipment Register I. C. C.—R. E. R. No. 241, issued by G. P. Conard, Agent, and the gallonage capacities in Freight Tariff 300, I. C. C. No. A-2518, issued by L. E. Kipp, Agent, supplements

Item No.	Rule No.	RULES
		thereto or reissues thereof, except that the gallonage capacities of cars, designed and used exclusively for handling of commodities on
100	1	which weights and charges are arrived at by weight and not by gallonage capacity of cars, need not be published in Freight Tariff 38, I. C. C. No. A-2518, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof.

[fol. 326] (b) Reporting marks will be assigned to car owners only, by the Secretary, Transportation Division, Association of American Railroads, upon written application. Such marks may be used also, on cars operated but not owned by the party to whom the marks are assigned, and, when so used, such cars, and the name and address of the owner to whom the mileage will be paid, must be shown by the assignee in his registration in the Official Railway Equipment Register, I. C. C.—R. E. R. No. 341, issued by G. P. Conard, Agent, supplements thereto or reissues thereof.

(c) Assigned reporting marks must be painted or stenciled on the body of the car. When reporting mileage allowances, the carding, placarding or boarding of cars will not be recognized.

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Item No. 100-A, (Cancels 100), Rule No. 1.
Effective January 15, 1936.
Mileage Tariff No. 7-J, I. C. C. No. 2791.

[fol. 327]

Item No. | Rule No. | RULES

PAYMENT OF MILEAGE

(a) Mileage for the use of cars of private ownership will be paid for loaded and empty movements only to the car owner—not to a lessee—provided cars are properly equipped and marked with the assigned reporting marks and car number and, provided, further, that the marked capacities, and assigned reporting marks are properly published in the Official Railway Equipment Register I. C. C.—R. E. R. No. 241, issued by G. P. Conard, Agent, and the gallonage capacities in Freight Tariff 300, I. C. C. No. A-2518, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof, except that the gallonage capacities of cars, designed and used exclusively for handling of commodities on which weights and charges are arrived at by weight and not by gallonage capacity of cars, need not be published in Freight Tariff 300, I. C. C. No. A-2518, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof.

(50) 100-A Cancels 100

(b) Reporting marks will be assigned to car owners only, by the Secretary, Transportation [fol. 328] Division, Association of American Railroads, upon written application. Such marks may be used, also, on cars operated but not owned by the party to whom the marks are assigned, and, when so used, such cars and the name and address of the owner, to whom the mileage will be paid, must be shown by the assignee in his registration in the Official Railway Equipment Register, I. C. C.—R. E. R. No. 241, issued by G. P. Conard, Agent, supplements thereto or reissues thereof.

(c) Assigned reporting marks must be painted or stenciled on the body of the car. When reporting mileage allowances, the carding,

placarding or boarding of cars will not be recognized.

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(50) Effective January 10, 1936. Issued under authority of the Railroad Commission of the State of California, No. 63-11739 of October 7, 1935."

(Page 8)

Mr. Williamson: Mr. Fort, there was something else that developed in the civil action and which——

Exam. Sharp: Just one moment. Off the record.

(Discussion off the record.)

Exam. Sharp: Go ahead, please.

[fol. 329] Mr. Williamson: I would ask counsel to stipulate that during the period in question the Southern Pacific Railroad Company, the Atchison Topeka and Santa Fe Railway Company and the Western Pacific Railroad Company, being the only transcontinental carriers serving the Bay Area over whose lines we would have to make our initial shipments in every instance had not, during this period, the tank cars available for our purposes and adaptable to the uses that our tank cars have been put.

Mr. Matthew: Personally, I would prefer that that stipulation just simply carry in this record pertinent testimony of the witnesses for the three carriers named in the civil action. It isn't very long.

Mr. Williamson: We will try to come to that a little later, then, and maybe you will be willing to stipulate then more broadly than at the present time.

Mr. Matthew: Possibly.

Mr. Williamson: Mr. Jeffrys, will you take the stand.

J. H. Jeffrys was sworn and testified as follows:

Direct examination.

By Mr. Williamson:

Q. Mr. Jeffrys, you are employed by the El Dorado Oil Works?

A. Yes, sir.

Q. State your full name.

[fol. 330] A. J. H. Jeffrys, J-e-f-f-r-y-s.

Q. In what capacity are you employed by those companies?

A. Traffic manager.

Exam. Sharp: For whom?

The Witness: El Dorado Oil Works.

By Mr. Williamson:

Q. What are your duties in that position?

A. As traffic manager I supervise the movement of our leased cars as well as the shipping of buyers' tank cars. We keep track of the mileage accrued by all cars regardless of the fact that General American does the same thing for the reason that when we receive the mileage statements from General American we must have some record of our own to check those statements against.

We also trace the cars, the movements by junction points on the railroads, so that empty cars do not get set out on the way home and are left to stand in some railroad yard, as well as issuing shipping instructions to the mill.

Q. Well, now, you are in charge of the shipment of all of the oil in tank cars from the plant to the El Dorado Oil Works?

A. Yes, sir.

Q. And who routes the cars?

A. On sellers' cars the seller usually provides the entire routing unless a buyer should specifically request that the car be routed over certain routes. On buyers' cars the buyer sends the car out empty over a certain railroad route [fol. 331] with the request that the car be returned loaded via the reverse routing.

This is always adhered to in order to save the buyer from getting into complications by having excess empty mileage on some railroad and not having loaded mileage on that railroad to compensate therefor.

Q. Well, in other words, you route the seller's cars or your leased cars as you direct unless a buyer has specifically requested another routing?

A. That is correct.

Q. And you route buyers' cars according to the directions that the buyer gives in sending the car forward for loading?

A. That is correct.

Q. All right. Now, you are familiar with the manner in which the oil is sold, the El Dorado Oil Company?

A. Yes, sir.

Q. The basis of sale?

A. Yes, sir.

Q. How is it and has it been sold always?

A. By standard contract printed form, states the price f.o.b. cars, seller's plant, Berkeley or Oakland, California.

Q. Then, what is done, what kind of a lading is used?

A. We use an ordinary bill of lading in practically every instance.

Q. And how is the price collected?

A. By a sight draft against the bill of lading with invoice [fol. 332] and weight certificate attached.

Q. Who pays the freight?

A. The buyer pays the freight.

Q. At the consignment point?

A. Yes, sir.

Q. All right. Now, have you ever had occasion to ask the carriers at Oakland or Berkeley for their tank cars for the movement of your oil in addition to those which were furnished by buyers and in addition to those which you had under lease?

A. There have been occasions when there has been a shortage of tank cars for vegetable oil movement wherein we could not secure any more cars from either General American or any of the other car companies and I have called upon the railroads, the different three railroads serving San Francisco and Oakland as to whether they could furnish coiled tank cars for loading coconut oil and have been told "no."

Q. Now, you mentioned "coiled tank cars." I wish that you would give a description of the tank cars that are in use in the transportation of the coconut oil of the El Dorado Oil Works together with an explanation as to any special

equipment that those tank cars have over the ordinary petroleum tank car.

A. Coconut oil requires a coil tank car which permits putting steam in the coils as, I think, under 70 degrees coconut oil solidifies and it must have, therefore, heat applied at destination in order to make the oil liquid so as [fol. 333] to flow out of the car.

Q. So that you require a tank car equipped with coils to heat the oil in order to move it at the point of destination?

A. That is correct.

Q. What size are the tank cars?

A. A standard size tank car for coconut oil shipments on which contracts are based is an 8,000 gallon tank car.

Q. And that is the one to which your testimony refers?

A. Yes. All of our tank cars under lease are 8,000 gallon tank cars.

Q. And those that are sent in by the buyers do they have the same capacity or are they of a different capacity?

A. In practically all instances buyers' cars are 8,000 gallon cars. We have occasionally been furnished a 10,000 gallon car by a buyer where he will furnish four 10,000 gallon cars in lieu of five 8,000 gallon cars to take up a contract.

Q. Are you familiar with the handling of the cars preparatory to shipment?

A. I have had no actual contact with the physical handling of the cars at the mill.

Q. But you know from what is done; you know what is done?

A. Yes.

Q. Do you know anything about the supply of tank cars that the Southern Pacific has for the service of this coast? You were connected with that company for some years, [fol. 334] weren't you, in the traffic department?

A. Yes, sir. I do know this; that in conversations since being with Mr. D. T. Ayres of the Southern Pacific Company, since being out of there, that I have been told on several occasions that their cars are mainly for their own use on their own line. I was told that by all three railroads at the time of the first hearing in the civil court, that they did not hold themselves out to furnish cars for movements of oil, that their own cars are mainly for handling their fuel oil and gasoline for their own purposes.

Q. Do you know what effect upon our Snowflake brand of coconut oil or the Super Cochin type of refined coconut oil would be the movement of them in an ordinary petroleum or gasoline tank car?

A. Well, I do know this: that our consignee would not accept oil sold him under contract under such specifications that did not hold up to that and I do know that we have had one or two claims, perhaps where a car has been shipped by us with the slightest change in red color and the consignee has filed claim on us for not providing the proper oil, meeting the contract specifications.

Q. Yes. Do you know to what that was due, that difference in quality?

A. I do know that it was determined that it was due to—by both parties to the contract—that it was determined [fol. 335] there was rust contamination in the oil.

Q. Do you know whether the El Dorado Oil Works or the El Dorado Terminal Company in respect to the movement of its oils on transcontinental carriers has ever had any agreement with any railroad carriers in respect to rates or mileage or mileage refunds?

A. No. All of our agreements have been between ourselves and General American.

Q. That is the only relationship?

A. Yes.

Q. Has El Dorado Oil Works or the El Dorado Terminal Company ever had any dealings or relations with the consignees in respect to rates or mileage refunds?

A. No, sir.

Q. Mr. Jeffrys, do you know any means, practical means, that the El Dorado Oil Works or the El Dorado Oil Company could apply or resort to for the shipment of its coconut oil to preserve its quality and its color other than that which you have followed by cleaning in the manner that was detailed by Mr. Gilmore, the tank cars that were used for your shipments?

Mr. Matthew: I don't think I understand that question. May I have it reread, please?

(The question referred to was read by the reporter.)

A. The only other means that I know of that would insure our quality of oil would be either to use a glass lined tank [fol. 336] car, or I have heard of cars that are now being

used for wine which, I think, have a lithopone coating. We have not as yet tried out a lithopone coated car. These lithopone coated cars which are used for wine without any coils are rented at $50 a month which is considerably over the rental for an ordinary steel tank car with coils.

Now, with a lithopone coated car with coils, I have been quoted by a representative of the tank car that to add coils to one of these 8,000 gallon cars should increase the rental about two and a half per car per month more, which, if lithopone coated cars would carry coconut oil, therefore, a rental of cars would probably go up to $52.50 or $55.00 a car. Even if we did have such cars it stands to reason we would still have to wash them down with some kind of material before loading them as after being unloaded by the consignee in the long trip back there is bound to be moisture or some impurities in the car.

By Mr. Williamson:

Q. Have you made any study as to the cost rental or otherwise of glass lined tank cars?

A. Well, I have been asking about them. Glass lined cars, I think, run around $50 a month but have been told they doubted whether they would be suitable to use for the long trips that our cars make continually because the glass has a tendency to crack.

Q. Do you know of any means of avoiding the cleaning [fol. 337] of the tank cars which is now practiced by the El Dorado Oil Works and the Terminal Company for the movement of coconut oil?

A. No, sir, I do not.

Mr. Williamson: That is all. You may question.

Cross-examination.

By Mr. Fort:

Q. Mr. Jeffrys, what proportion of your shipments are made in buyers' cars rather than your own and were made in the period '34 through '36?

A. I think it is around 60 per cent sellers' cars and 40 per cent buyers' cars. I went back once and checked those; I went back and checked the shipments; I believe 60 per cent sellers' cars to about 40 per cent buyers' cars is correct.

Q. Is the difference in the price you receive for your commodity dependent upon whether it moves in your car or a buyer's car?

A. No, sir.

Q. Do you subject the buyer's car to this special preparation as you do the seller's car?

A. Yes, sir.

Q. Do you bill the buyer for the expenditure you make in that connection?

A. No, sir, we never have.

Q. There are other grades or colors of coconut oil shipped which are different from the grade or color you ship, is that true?

[fol. 338] A. That is true.

Q. Do the various grades in that respect move under the same rates, rail rates?

A. The rail rate on coconut oil applies on crude or refined coconut oil.

Q. Are there grades of coconut oil which would not require the special type of treatment which you give to your product?

A. I don't believe——

Mr. Williamson: You mean the cars or the oil itself?

Mr. Fort: The cars.

The Witness: I don't believe that Manila type coconut oil will require the special treatment because my understanding of the trading practices is that Manila type coconut oil is not sold with definite color specifications.

By Mr. Fort:

Q. But it would take the same freight rate?

A. It would take the same freight rate.

Q. What has been your traffic experience very generally, Mr. Jeffrys?

A. I worked in the District and Foreign Freight office of the Southern Pacific Company from 1927 until 1935 and I have been with the El Dorado Oil Works since that time.

Q. On many shipments in box cars is a certain amount of bracing necessary, for example, shipments of eggs and things of that kind?

Mr. Williamson: Mr. Examiner, I believe that that is [fol. 339] wholly immaterial and would broaden the inquiry here into box cars and bracing of those for the transporta-

tion of eggs and I think we hardly are interested in that.

Exam. Sharp: Well, I think perhaps he has other matters to develop by that question.

A. To the best of my knowledge I believe so.

By Mr. Fort:

Q. That special preparation in the way of bracing is paid for by the shipper?

A. That question I can't answer. That is, I wouldn't know right now as to whether the shipper pays for that or whether——

Q. How long did you say you were with the Southern Pacific?

A. Eight years, I believe.

Q. What was the situation when you were with them? You knew then didn't you?

A. As far as I can recollect in quoting rates the rates did not include bracing.

Q. You know, Mr. Jeffrys, the shipper pays that, don't you?

A. I believe so, but not having shipped any eggs I can't say truthfully.

Q. No, but you were with a railroad where some eggs were shipped?

A. I was quoted rates for the railroad.

Q. Well, now, on shipments of machinery and other articles on flat cars when various types of bracing and securing of the shipment is necessary, special preparation for that shipment, who puts in that bracing? Who pays for it?

[fol. 340] Mr. Williamson: We again object.

Exam. Sharp: Objection overruled.

Mr. Williamson: As without the issues.

Exam. Sharp: Go ahead, Mr. Fort.

Mr. Fort: Well, that was the question.

A. I don't know that I can truthfully say never having been a shipper of any material in box cars other than our own coconut meal, whether a shipper of machinery pays for all the bracing or not, I couldn't say.

Exam. Sharp: What did you say your position was with the Southern Pacific?

The Witness: Well, I served in various capacities. I served part time as rate quotation clerk but I couldn't—that

was over six years ago now and I couldn't state right now just what the tariffs did state at that time from memory.

Exam. Sharp: It has been six years since this complaint originated, too, hasn't it?

The Witness: Yes.

Exam. Sharp: You have been with this company only during the period in which this complaint arose?

The Witness: I started to work for El Dorado Oil Works on August 5th, 1937.

Exam. Sharp: Go ahead.

By Mr. Fort:

Q. Mr. Jeffrys, do you deal with the railroads with respect to cleaning cars for El Dorado? I mean, is that a [fol. 341] part of your work?

A. Where very frequently a buyer will send us a car for loading coconut oil in his instructions concerning the car he will say, "This car was last loaded with tallow," or was last loaded with some other commodity. "Please have either Southern Pacific or the Western Pacific or Santa Fe", whichever line he is sending the car out on, "clean this car before loading." When the buyer instructs us to do that we have no other alternative but to comply with the buyer's instructions.

Q. You heard Mr. Gilmore's testimony this morning, didn't you?

A. Yes, sir.

Q. Was that correct so far as you know?

A. Yes, sir.

Q. And he testified, I believe, that sometimes you asked the railroads to clean your cars, leased cars too?

A. Occasionally.

Q. Occasionally?

A. Yes.

Q. When you do, they clean them, is that so?

A. That is correct.

Q. And you know what kind of cleaning they are going to give them when you ask them to clean them, don't you?

A. Well, my understanding is that they steam clean the cars. Now, beyond that, I have never gone into the technical phase of it.

[fol. 342] Q. Yes; did you ever ask the railroads to give any other character of cleaning than the one they do give when you request it?

A. We had an occasion just a short time ago where a buyer wanted to buy a very small quantity of coconut oil. We secured from a San Francisco firm, a 4,000-gallon tank car, which is a very rare tank car. The party from whom we secured the car ordered it into the Southern Pacific for cleaning before being sent to us for loading. It was a borrowed car on our part. The car came into our plant, was not sufficiently suitable to load this Super Cochin type of oil, was too rusty. We sent it back to the Southern Pacific. They didn't want to clean it a second time so we sent them two five-gallon cans, I think, of coconut oil and asked them when they cleaned the car would they rub it down with this coconut oil so as to prevent its rusting before it got back to us so that we could properly take care of their shipment being that they had done all they could do in cleaning the car originally. If the car rusted between the time it went from their yard to our plant they couldn't do anything more about it so it was to prevent that overnight rusting that we furnished them with the oil for rubbing the car down to prevent that rusting, but such a case as that is very, very rare and I only remember of once in the five years that I have been with the El Dorado Oil Works that we have done that.

[fol. 343] Q. They did rub it down for you?

A. Yes.

Q. They did what you asked them to do?

A. Yes.

Q. Don't they, as a regular rule when they clean cars at your request, rub it down with coconut oil when your send the oil over there to them?

A. We can't afford to send them the oil for every car because we can't reclaim that oil.

Q. However, the railroad does it when you ask them to and give them the oil to do it with, don't they?

A. If we gave them the oil to do it they probably would.

Q. Well, you just answer my question. Then, your lawyer can ask you anything he wants to.

A. As I say, I only remember once in five years that we have made that request.

Q. You can only remember once in five years that you have asked them to rub down with coconut oil?

A. Yes.

Q. You are not in very close touch with that situation, are you, Mr. Jeffrys?

A. Yes, I am.

Mr. Fort: Well, then I am not.

Mr. Williamson: I will admit that; I will stipulate that you are not.

[fol. 344] Mr. Fort: That is all. Thank you.

Mr. Matthew: May I ask just one or two questions, if you please.

Exam. Sharp: Were you through, Mr. Fort?

Mr. Fort: Yes, sir.

Exam. Sharp: I just want to follow up one of Mr. Fort's questions by asking you if you know under what arrangements the carrier is expected to clean the privately owned cars?

The Witness: I think it is a matter of long standing, even before I ever went to work for the Southern Pacific Company. I know down there that when I served in that capacity that we often arranged for them as a matter of solicitation work. The carriers have obligated—well, I wouldn't say "obligated", but the carriers have taken upon themselves to clean the car providing they receive the line haul on the loaded movement. If a carrier cleaned a car and didn't receive a line haul they would send a bill to the party who asked them to clean the car for the cleaning.

Exam. Sharp: That is the reason for expecting the carrier to clean cars?

The Witness: Yes.

Exam. Sharp: Privately owned cars?

The Witness: They expect to receive a loaded haul in return for the cleaning.

Mr. Fort: That is the type of cleaning they undertake [fol. 345] to give?

Exam. Sharp: Exactly. What would be the charge of the cleaning service if they did not get the line haul that they expected to get?

The Witness: That is not a tariff charge but is a charge in their operating department and I believe in the past it has been $6. However, I have been given to understand that they are making changes in that; what they are I don't know.

Exam. Sharp: Go ahead, Mr. Matthew.

Mr. Fort: Pardon me I have another question in view of that.

By Mr. Fort:

Q. If the carrier cleans the car on which it doesn't get the road haul you say there would be some charge?

A. Yes.

Q. Isn't that car offset and balanced to give the carrier a car for a road haul movement that it didn't clean?

Mr. Williamson: I don't quite catch your question.

Mr. Fort: Will you read the question, Miss Reporter?

(The question referred to was read by the reporter.)

A. That has been—well, just exactly how to put—I can give you an example. For instance, there have been occasions when we have gotten extra cars from General American. In furnishing the car to us, either they or the office or the mill, somewhere along the line, slipped up as to who last cleaned that car before the movement. Say, for instance, the Southern Pacific furnished—cleaned a tank [fol. 346] car which was furnished to us, we loaded it and it went out Western Pacific. If we in turn got a car cleaned by the Western Pacific and shipped it out Southern Pacific, the Southern Pacific would cancel the cleaning charge.

By Mr. Fort:

Q. Well, now, have you paid any railroad, during this period, any cleaning charge for a car they cleaned?

A. We have never paid the railroad.

Mr. Fort: No, sir. That is all.

Mr. Williamson: The cleaning to which you referred in your answer to Mr. Fort's question and also to the Examiner's question was that kind of steaming and sort of preliminary cleaning that the railroad gives to the cars?

The Witness: Yes.

Mr. Williamson: Not the cleaning that you give the cars?

The Witness: No, sir.

Mr. Matthew: Just one or two questions, please.

By Mr. Matthew:

Q. Mr. Jeffrys, I understood from your prior testimony that your company makes shipments of coconut cake and of coconut meal in addition to the shipments of coconut oil?

A. Yes, sir.

Q. Are these shipments of coconut cake and meal made in box cars?

A. Yes, sir.

Q. And I assume that during this period from 1934 to 1936 they were necessarily made from Berkeley.

A. Yes, sir.

Q. Do you know when you started making shipments from [fol. 347] Oakland, by the way?

A. I couldn't give you the exact date, no.

Q. It was some time after the year 1936, was it not?

A. Yes, sir.

Q. And when your company makes shipments of coconut cake or meal is it the practice of your office to keep a record of such shipments?

A. We have a meal department that keeps a record of that, yes.

Q. Well, aren't those cars routed to some extent by your office or under your direction?

A. They are routed by our office, yes, sir.

Q. And you keep a record of those cars and of their movement?

A. Just what do you mean by a record of their movement?

Q. Well, don't you have records which show how the cars are routed?

A. Yes. The reason I asked you the return question is that when we keep records of tank cars we trace those cars out and back, whereas a box car, after it is shipped and gets to its consignee, we have no further idea of keeping a record of that.

Q. Now, I understand that, but you do keep a record of all shipments made by your company in your office?

A. Yes, sir.

Mr. Matthew: That is all. Thank you.

Mr. Williamson: That is all.

Exam. Sharp. Any further questions of Mr. Jeffrys?

[fol. 348] Mr. Williamson: That is all, Mr. Jeffrys.

Exam. Sharp: You are excused.

(Witness excused.)

Do you have another witness, Mr. Williamson?

STIPULATION AS TO CERTAIN TESTIMONY

Mr. Williamson: I was going to return to this tank car business again on the record to see if I cannot get from

counsel a stipulation to the effect that during the period in question the Southern Pacific Railroad Company owned only 40 tank cars of 6,000 gallon capacity, about 50 of 8,000 gallon capacity, 73 of 10,000 gallons capacity and 2100 of 12,500 gallons capacity, that under the operating rules of the Southern Pacific those cars could not be moved to eastern points except on a continuous operation for their return, covering their return, and that in substance they had no cars of the type required by the El Dorado Oil Works for the movement of its oil that were available for use by the El Dorado Oil Works.

Mr. Matthew: If the Examiner please, I have no objection to stipulating into this record the summary or the report of the testimony given by the Southern Pacific witness which Mr. Williamson has in part quoted and in part paraphrased. It covers but a little more than two pages of the printed transcript.

Now, I don't want to seem to quibble with counsel as to slight differences between his summary and what appears to have been stated by the witness himself, but it seems to me that we might just as well have the exact text of the witness' testimony.

[fol. 349] Mr. Williamson: All right. I didn't read what was more favorable to me, that during the period——

Exam. Sharp: Just a minute, Mr. Williamson.

Would it be satisfactory to you to copy those two pages into the record, or three or four, or whatever they are?

Mr. Williamson: Well, I thought that we should try and stipulate the facts which are within the knowledge of all and which were covered by the testimony before so as to simplify the record. Now, if counsel says he doesn't desire to—did you say quibble?

Mr. Matthew: Yes.

Mr. Williamson: Well, whether you desire to or not, you are, and if you prefer to adhere to it, why, I can either call upon the Southern Pacific and get Mr. Ayres or some witness who testified before to state the facts as he testified to them.

Mr. Matthew: If the Examiner please, the reason for my observation is this: Mr. Ayres in part testified, as shown on page 164 of this transcript from which Mr. Williamson has been reading—I will just quote three sentences—I would rather read a little more to be sure that I am perfectly fair to Mr. Williamson.

Mr. Williamson: Well, read 163.

Mr. Matthew: I am going to illustrate my objection to putting it in as Mr. Williamson has undertaken to do. Mr. Ayres testified in part as shown upon page 164 of the [fol. 350] transcript on cross-examination—I am quoting—"The Southern Pacific Company owns some tank-cars and has owned tank cars for a great many years past. Those tank cars are sometimes supplied to shippers for the loading of such liquid commodities as oil. They are sometimes furnished to shippers for the loading of coconut oil. We have very few facilities of that kind and to meet the requirements of the trade we have to call upon shippers to furnish their own cars. If they are small shipments we might handle them. We do not attempt to meet the requirements of that particular trade. It would be an isolated case where we supply the cars. The company owns only approximately 50 tank cars of the kind used in the transportation of coconut oil. It is a matter of hundreds of tank cars over and above those 50 cars, that are traveling over our lines during the season for the movement of the oil."

Now, my only point was that I thought not only the substance of his testimony on direct but the somewhat qualifying testimony he gave on cross should be in. I am not making any contention that the rail carriers have equipped themselves to furnish all of the tank cars the shippers required, not at all. I simply think the testimony ought to go in as it is.

Mr. Williamson: Well, it is more favorable to me because you didn't read the most favorable part of it.

Mr. Matthew: Let us put it all in; I will stipulate it all in.

Mr. Williamson: If the Examiner would like to have it all [fol. 351] in we will put it all in. We will put in the testimony of David T. Ayres on pages 163, 164, at the top of 165 of this same transcript in the Supreme Court and the testimony of Mr. Emerson, Percy H. Emerson, on page 165 of the Western Pacific Railroad.

Mr. Fort: What was his position, Mr. Williamson?

Mr. Williamson: He was transportation inspector of the Western Pacific Railroad Company, and the testimony of John A. Christie, division superintendent of the Atchison Topeka and Santa Fe Railway Company, pages 166 and 167 and 168.

Mr. Matthew: That will be agreeable to me.

Examiner Sharp: Do you agree to that, Mr. Fort?

Mr. Fort: In a matter of that kind, I must be governed, of course, by counsel representing the particular companies, the Western Pacific and the Southern Pacific. I understand they would have no objection to such a stipulation.

Mr. Wedekind: That is correct.

Mr. Bradshaw: That is correct.

Examiner Sharp: You will see to it that the reporter has that book from which to make the copies?

Mr. Williamson: Yes, sir. You have the pages, haven't you?

The Reporter: Yes, sir.

Mr. Williamson: And here is the book.

[fol. 352] "Thereupon DAVID T. AYRES, called as a witness on behalf of the plaintiff being first duly sworn testified as follows:

"Direct examination.

"By Mr. Williamson:

"I am the freight car service agent for the Southern Pacific Company. In that capacity I am familiar with the tariffs and the use and operations of tank cars, and with the position of the Southern Pacific Railroad Company in regard to supplying tank cars. Referring particularly to the period from September, 1933 to and including August, 1935 the Southern Pacific Company did not own sufficient tank cars for general use or service suitable for use in the transportation of cocoanut oil from the San Francisco bay area to eastern points, nor was the Railroad obligated under the Consolidated Freight Classification Tariff No. 10 effective December 7th, 1935 and the tariff regulations which were practically the same and were in effect prior to that time. During that period we did not generally furnish tank cars for the use of edible oils. We but rarely allow our tank cars to go east of a certain point. I am familiar with the nature of the service of the El Dorado Oil Works. We do not hold ourselves out to supply cars for transportation of the type mentioned here.

"Cross-examination.

"By Mr. Matthew:

[fol. 353] "The Southern Pacific Company owns some tank cars and has owned tank cars for a great many years past. Those tank cars are sometimes supplied to shippers for the loading of such liquid commodities as oil. They are sometimes furnished to shippers for the loading of cocoanut oil. We have very few facilities of that kind and to meet the requirements of the trade we have to call upon shippers to furnish their own cars. If they are small shipments we might handle them. We do not (46) attempt to meet the requirements of that particular trade. It would be an isolated case where we supply the cars. The company owns only approximately 50 tank cars of the kind used in the transportation of cocoanut oil. It is a matter of hundreds of tank cars, over and above those 50 cars, that are traveling over our lines during the season for the movement of the oil.

"Redirect examination.

"By Mr. Williamson:

"Roughly, the Southern Pacific Company owns 40 tank cars of 6,000 gallons' capacity; about 50 of 8,000 gallons' capacity; 73 of 10,000 gallons' capacity; and about 21,100 of 12,500 gallons' capacity. The tank cars which were used by the El Dorado Oil Works in the transportation of cocoanut oil were those having a capacity of 8,000 gallons. If we furnish them they would have to move to eastern points and come back in a more or less continuous operation. Of course, being our cars, they would have to come back to our railroad.

[fol. 354] "Thereupon, PERCY H. EMERSON, called as a witness on behalf of the plaintiff, being first duly sworn testified as follows:

"Direct examination.

"By Mr. Williamson:

"I am transportation inspector of the Western Pacific Railroad Company, in charge of the movement of tank cars.

I know the tank car situation of that company, what tank cars they have, and for what purposes they offer them to the public. The Western Pacific Railroad Company during the period September, 1933, through and including August, 1935 did not have tank cars for rental or for use by the public in the transportation of vegetable oils from Bay points to eastern points. We would look to the tariffs to which Mr. Ayers referred to find the freight rate to be paid on the movement of the commodities from the San Francisco Bay area to eastern points, and to determine the (47) amount that the railroad companies under which the haul was made, would pay to the supplier of the tank cars on each of such hauls, and there were no other tariffs or rules or regulations applicable to those subjects.

"Cross-examination.

"By Mr. Matthew:

"All I meant by my answer was that certain freight tariffs are published by the carriers and are filed with the Interstate Commerce Commission, which includes certain [fol. 355] freight rates and include among other rates governing the movements of cocoanut oil in tank cars from points in California to points in the Middle West and the East.

"Thereupon John A. Christie called as a witness on behalf of the plaintiff being first duly sworn testified as follows:

"Direct examination.

"By Mr. Williamson:

"I am Division Superintendent of the Atchison-Topeka and Santa Fe Railway Company. I have in charge the matter of transportation of tank cars and freight cars. I don't know whether the Santa Fe has ever furnished any tank cars during the period between September, 1933, and August, 1935, to the El Dorado Oil Works for the movement of cocoanut oil from the San Francisco Bay Area to eastern points. We have no tank cars assigned to the service of the El Dorado Oil Works or to the movement of cocoanut oil. I have no knowledge that any were ever so assigned. I do

not recall that any were ever assigned to the Durkee Famous Foods Company, or the Best Foods Company, or the Philippine Refining Company. The Santa Fe has tank cars of that type available. We have all classes of tank cars. We do not have enough cars to handle the public demand.

"Cross-examination.

"By Mr. Matthew:

[fol. 356] "By assigned cars I meant that they were exclusively (48) set aside for the service of the shipper. The company owns a great many tank cars, I think 3400, that are used throughout the Santa Fe system, and from time to time are furnished to shippers for the transportation of liquid commodities when available.

"Redirect examination.

"By Mr. Williamson:

"These tank cars are used in the transportation of fuel oil. El Dorado Oil Works might have ordered a car at some time for the transportation of its cocoanut oil and we might have furnished the car. We don't furnish a car to the El Dorado Oil Works for the transportation of its cocoanut oil unless they order it, and I don't recall ever furnishing one. It is my understanding that the railroad companies do not hold themselves out as furnishing tank cars for the movement of vegetable oils.

"Recross-examination.

"By Mr. Matthew:

"I meant that the tank cars of the Santa Fe were built for their own use exclusively for the transportation of fuel oil, but are sometimes switched into other service like gasoline and distillate. I don't recall using an oil car for the transportation of wine but it is possible. I think the tank cars of the Santa Fe are sometimes furnished to shippers and used for the transportation of vegetable oil. If we got an order for a load of cottonseed oil and had a car, we would place it for loading. This would be in the same way that we would furnish a car if we had it available for [fol. 357] the transportation of cocoanut oil. If a shipper

such as El Dorado Oil Works should ask us to supply a car for the transportation of cocoanut oil from Oakland or Berkeley to a point in the middle west or east reached by or through our road, and we had such car available, the El Dorado Oil Works would be regarded the same as any other company that had certain commodities to move from one point to another, and if we had the car (49) available we would furnish it. Not many of these tank cars of which I speak are equipped with coils. In the movement of cocoanut oil, the coil part is necessary."

Exam. Sharp: Proceed.

Mr. Williamson: I have no further witnesses.

OPENING STATEMENT FOR RESPONDENTS

Mr. Fort: Mr. Examiner, after Mr. Williamson made his opening statement I sought an opportunity to reserve my statement until this time. There are just a few things I would like to say.

In the first place, the respondents in this case regard themselves in a sense as being the nominal parties to the case and I hope, I should say, they will make the reason for that feeling clear. We think that the issue before this Commission in this proceeding is a very narrow issue and an issue wholly restricted to a past period ending in December, 1936. This is the first proceeding of this character [fol. 358] which has ever been before the Commission or before any other administrative body so far as I know. The Commission is not proceeding here under a jurisdiction which it would have in the act independent of a pending court proceeding. The Commission's jurisdiction here and the cause for its entertaining the petition and the cause for its order of investigation is to be found in the fact that there is a pending court proceeding and that in that pending court proceeding an administrative question arose in connection with which the judgment and the decision of this Commission became necessary for the disposition of the court proceeding and not for anything that this Commission might order or require in and of itself. In other words, any requirement growing out of this proceeding would be a requirement of the United States Court and the finding that the Commission might here make would merely be a finding

incident to that requirement or order by the United States Court.

Now, the party defendant in the proceeding in court, which is the only proceeding here looking to a requirement from any authority, court, commission, or anyone else, is the General American Car Company. The respondents in this proceeding before the Commission are not defendants or parties in the proceeding before the court in connection with which the finding of the Commission in this case will find its only purpose and use, a very anomolous situation, so I say in that very sense of the word, at any rate, the respondents here are merely nominal parties.

[fol. 359] That doesn't mean, however, that we do not wish to present to this Commission any information which we may have that may help the Commission, and neither does it mean that we haven't any interest in what the Commission may do here, but I do wish, if I may, to get upon the record at this time our understanding of the issue now before the Commission. As I say, the Commission has this case before it for the purpose of making a finding of a character never before made by the Commission.

I think that will be enough to indicate to you what our thought is with respect to the issue. The issue, as I understand it, is whether for this past period this shipper might have received from the Tank Car Company more money than it did without producing a rebate or concession from the rate, and, if so, how much more it could have received during that past period.

There are one or two witnesses that I would like to put on but if this is a convenient time for the afternoon recess I think it might hurry the testimony a little if it would come now.

Exam. Sharp: Well, it is a little early if we are going to run late to get it all in.

Mr. Fort: It will only take four or five minutes to talk to these witnesses a moment. I hadn't anticipated it would come so soon.

Exam. Sharp: Well, we will take a few minutes recess.

(A short recess was taken.)

[fol. 360] Exam. Sharp: The hearing will come to order.

Mr. Fort: Mr. Podlech.

R. A. PODLECH was sworn and testified as follows:

Direct examination.

By Mr. Fort:

Q. Mr. Podlech, are you employed by the Atchison Topeka & Santa Fe Railway Company?

A. Yes sir.

Q. In what capacity?

A. Supervisor of Freight Claim Prevention, Los Angeles, California.

Q. Are you familiar with the practices with respect to cleaning tank cars in the San Francisco area?

A. Yes sir.

Q. Under what conditions do the railroads clean those cars?

A. Where they obtain the line haul they will clean the cars upon request.

Q. Is that true of tank cars used for coconut oil shipments?

A. Yes sir.

Q. Are you familiar with El Dorado Oil Works and El Dorado Terminal Company?

A. Yes sir.

Q. Is that true with respect to the cars used by that company?

[fol. 361] A. Upon request we would clean any cars that they asked us to.

Q. You are speaking for the Santa Fe?

A. Yes.

Q. Are there other shippers of coconut oil in the San Francisco area?

A. Yes sir.

Q. Now, I am speaking of the period '34, '35 and '36. Do your answers go to that period?

A. As far as I can recall there was another concern, the Philippine Oil Company that was shipping coconut oil during that period.

Q. And did you have the same rule and practice with respect to that company that you did with El Dorado in that you cleaned cars when they requested you to and otherwise not?

A. Yes sir.

Q. Did you, as a matter of fact, during that period have any requests to clean any El Dorado cars?

A. Yes sir.

Q. Did you have any requests to clean any of the so-called leased cars to the El Dorado Company?

A. According to a check of the records I think there was one leased car that was cleaned during that period.

Q. There was only one leased car which they asked you to clean during that period?

[fol. 362] A. Yes sir.

Q. Did they ask you to clean during that period any of the so-called buyers' cars?

A. There were other cars that were cleaned either at the request of the El Dorado or by the buyers or the tank car company themselves during that period to the number of 40.

Mr. Fort: I didn't quite understand all that answer. Maybe you had better read it.

(The answer referred to was read by the reporter.)

By Mr. Fort:

Q. Well, do you mean by that that you were requested to clean 40 cars in which coconut oil moved from the El Dorado Company?

A. Yes sir.

Mr. Williamson: That isn't what he said before. You have testified to it but I want to be sure whether he understands that is for the El Dorado Oil Works.

The Witness: El Dorado Oil Works, yes sir.

Mr. Fort: What did I say that was wrong, Mr. Williamson?

Mr. Williamson: You didn't say anything that was wrong according to his present statement, but according to his previous statement he has said they cleaned one leased car and he hadn't said that they were for the El Dorado Oil Works. You said it and now he says it.

Mr. Fort: Well, is everybody happy now?

[fol. 363] Mr. Williamson: I am very happy; I don't know whether you are.

By Mr. Fort:

Q. Did you clean any cars during that period for any other oil shipper except the El Dorado Company, and when

I speak of the "El Dorado Company", I mean both El Dorado Oil Works and the El Dorado Terminal Company, because they were one and the same, a hundred per cent stock ownership.

A. Yes, we did.

Q. Who did you clean any other cars for?

A. For the Philippine Oil Company.

Q. Where is that plant?

A. Over at Point San Pablo.

Q. And that company shipped coconut oil during this period?

A. Yes.

Q. Do you know what the nature of the cleaning was which you gave to cars when you were asked to clean them or will that be covered by another witness?

A. That will be covered by another witness.

Q. Did any coconut oil shipper in the San Francisco area complain of the character of cleaning which the railroad gave these cars?

A. We have no record of any such complaints.

Q. Do you know what the coconut oil shippers did with the cars if anything, after you delivered them either [fol. 364] cleaned or not cleaned, according to what they wanted?

A. No sir.

Mr. Fort: That is all. Thank you.

Cross-examination.

By Mr. Williamson:

Q. Mr. Podlech, you state you are employed by the Atchison-Topeka & Santa Fe Railway Company?

A. Yes sir.

Q. That you are located at Los Angeles?

A. Los Angeles, yes sir.

Q. You have testified, nevertheless, to the fact that you are familiar with the practice of cleaning cars in the San Francisco Bay area?

A. Yes sir.

Q. How much of your time did you spend in the San Francisco Bay area?

A. Prior to being transferred to Los Angeles I was the agent at Oakland, California.

Q. And what years was that?

A. That was prior to the time of this particular case, but I was——

Q. Prior to 1934?

A. Yes sir.

Q. How much of the time since 1934 have you been in Oakland?

A. Why at different periods, different trips.

[fol. 365] Q. Well, for how long a time?

A. Oh, just a day at a time.

Q. So all the information really that you have since 1934 is that that you derived by being here a day or so at a time?

A. By conducting certain investigations.

Q. No, but isn't that a fact, that is all the personal knowledge you have?

A. By making investigations, yes sir.

Q. No; I think you can answer that is what somebody told you or what you looked up. What you know of your own personal knowledge is only that which you derived since 1934 by reason of the fact that you were on occasions here a day at a time?

A. (No response.)

Mr. Fort: May I ask a question that may clear that up?

Exam. Sharp: Yes sir.

Mr. Fort: Did you make a special investigation in connection with this particular proceeding of these matters to which you have testified?

The Witness: I did, yes sir.

Mr. Williamson: No, I am not—I think I am entitled to an answer to my very clear question on cross-examination.

[fol. 366] Exam. Sharp: Will you detail further your duties as the supervisor of the Freight Claim Prevention?

The Witness: My duties——

Mr. Williamson: With all due respect to the Examiner I am not concerned about that. I have asked a question as to a particular matter. I would like an answer to that question, not to yours.

Exam. Sharp: Well, get the answer to mine first.

The Witness: My duties as a freight claim—or as a supervisor of the Freight Claim Prevention pertains to prevention matters, but in addition to that I also cover

special assignments given to me by my superior, the General Manager of the Santa Fe. One of these duties was in connection with this tank car case to make an investigation which I did on the ground by going to Richmond and Oakland on several occasions and conducting an investigation on the ground.

Exam. Sharp: Did that investigation cover the entire period between 1934-'36?

The Witness: It did, yes sir.

Exam. Sharp: Now, he is answering the question, as a result of investigation made in the ordinary course of his duties. That is a proper answer.

Mr. Williamson: I am not disputing that, sir. I am ask-[fol. 367] ing still if his knowledge as to what he knew personally of these things during the period in question was not derived wholly from the fact that he was here in the Bay region a day or so at a time over that period of three years, two or three years.

Exam. Sharp: Well, the purport of your question is that his information is necessarily very restricted and limited because he was here only a day occasionally.

Mr. Williamson: Well, of course, that is the natural effect of it.

Exam. Sharp: I think if he testifies that he made an investigation for the express purpose of finding out in the line of his duties, that that is quite a different picture.

Mr. Williamson: I am not discussing that. I am asking him about the other point. You are quite correct in your statement that the purpose of it was to show that he had only restricted personal knowledge. We will take up the next thing separately, the next point, but that thing I feel we are entitled to an answer upon.

Exam. Sharp: Well, we don't want to distort the record by an improper answer. Now, he can answer the question——

The Witness: Well, my answer to that is that I conducted an investigation to the best of my ability by coming [fol. 368] up to the Bay region on several occasions and interrogating the parties who were thoroughly familiar with the data that we secured in the case.

By Mr. Williamson:

Q. All right. Have you the data that you secured in the case?

A. Yes sir.

Q. With you?

A. Yes sir.

Q. Will you produce it?

A. I have a whole brief case full of data, but I would like to know just what data you would like to have produced.

Q. Well, we will try and narrow it down somewhat. I don't wish to have a brief case because that is rather a cumbersome record, but you mentioned one, the Santa Fe, I assume this is.

A. Yes sir.

Q. Cleaned some cars for the Philippine Refining Company?

A. Yes sir.

Q. The Philippine Vegetable Oil Company?

A. That is according to the records.

Q. And do you know where that oil was shipped, from what point?

A. It would be shipped from Point San Pablo and Richmond.

Q. There is a waterfront tank there?

[fol. 369] A. Yes.

Q. Did you see the tank?

A. No sir.

Q. Did you see the oil?

A. No sir.

Q. Do you know what character of oil it was?

A. I do not, no sir, other than it was coconut oil.

Q. You only know it was coconut oil?

A. Coconut oil.

Q. And you do not know that that was coconut oil that had been manufactured in the Philippine Islands delivered from the steamer's hold to the tank on the Contra Costa Waterfront and from there loaded into tank cars?

A. No sir, I don't know that.

Q. So you don't know what that oil's classification as to color or anything else was?

A. No, I was not interested in that.

Q. Now, do you know how many cars the Santa Fe Railroad Company cleaned for the Philippine Vegetable Oil Company during that period?

A. I have no record. We could obtain that for you, though.

Q. But you don't know?

A. No.

Q. Well, you spoke of cleaning one leased car, you said one leased car during that period of 1934, '35 and '36.

[fol. 370] A. Yes sir.

Q. Now, can you identify that car?

A. We have a witness who can identify it, yes sir.

Q. Is he here?

A. Yes sir.

Mr. Fort: You mean, does he know the number of it?

Mr. Williamson: I wanted to know whose car it was and so on. He says he doesn't know. He can't identify it so I won't pursue the subject with him.

The Witness: We have a witness who can identify the car.

By Mr. Williamson:

Q. I see. When was that? Can you identify the period of time?

A. He has the data.

Q. You haven't that either?

A. No sir.

Q. Now, then, you stated that you, the Santa Fe Railroad again, I assume, would clean cars upon request?

A. Yes sir.

Q. Do you know what the Santa Fe Railroad Company did in the way of cleaning those cars?

Mr. Fort: I have a witness on that point, Mr. Williamson.

A. We have a witness who can testify to that.

Mr. Williamson: You seem to have a witness for everything.

[fol. 371] Mr. Fort: Everything.

The Witness: Yes sir.

By Mr. Williamson:

Q. Still all of those things were not covered by this very general investigation made by you in line of your official duty?

A. They were covered, yes sir, but the other witness is in a better position to tell you about the cleaning than I am because he actually performed the service.

Q. That was the point of my objection. I thought somebody might know more than you did about it. That is the reason I objected.

A. I am not a mechanical man. I have nothing to do with the cleaning of the cars.

Q. You don't know how they are cleaned?

A. No sir.

Q. Now, then, what is your information about requests, cleaning requests? Did they ever come to you?

A. No sir; they are handled through the agent at Richmond; requests are made on him.

Q. So when you spoke about cars being cleaned upon request you merely meant to say that somebody had told you that these requests were made through the Richmond office, is that right?

A. I verified that by checking the records over at Richmond and finding the system about how the cars are cleaned.

[fol. 372] Q. Well, was there a written record of request?

A. There is a telegram on file at the agent's office in connection with the cars as they wanted them cleaned. I couldn't say they have them for this period here, but the practice is whenever they want any of these cars cleaned they will telegraph over to the agent at Richmond, give him the car number, tell him what it is to be loaded with and who it is for and tell him to clean it. He will arrange to have the car cleaned.

Q. Well, then, those were telegrams from out of state points?

A. Not necessarily, no sir.

Q. Well, can you name any from an in-state point?

A. You mean the orders for having the cars cleaned?

Q. Yes.

A. Well, they come usually from the Traffic Department over here at San Francisco.

Q. Oh. Then they are——

Exam. Sharp: You mean of the Philippine Oil Company?

Mr. Williamson: No; of the Santa Fe Railroad.

The Witness: Of all the tank cars, any tank cars that are to be cleaned.

By Mr. Williamson:

Q. Now, let's see what you mean. The Examiner asked whether the Traffic Department of the oil company or the Traffic Department of the railroad——.

A. The Traffic Department of the Santa Fe Railway.

[fol. 373] Q. So what you know about requests for cleaning cars comes from the fact that the Santa Fe office in San Francisco telegraphed to the Richmond office to have certain designated cars cleaned?

A. Yes sir.

Q. For loading?

A. Yes sir. Those orders also might come occasionally from our office at Los Angeles.

Q. All right. Is that all?

A. That is all.

Q. That you remember?

A. That is all.

Q. All right. And those requests, then, were confined to the cleaning of cars at Richmond?

A. Yes sir.

Q. All right.

A. I might add that we clean all of our tank cars for the San Francisco Bay area at Richmond. That is why I centered on the agency at that point.

Q. I see. Now, you said in response to a question by Mr. Fort that in that period your people had cleaned one leased car, and, I think, I asked you this before, you said you didn't know which one it was. Where was that car cleaned; do you know that?

A. Cleaned at Richmond.

[fol. 374] Q. At Richmond. Now, then, you said that during that same period as to which you were questioned there were 40 cars cleaned.

A. Yes sir.

Q. Upon request?

A. Yes sir.

Q. I understand that your investigation in the line of your duty has shown that during that period of three years, the Santa Fe Railroad Company cleaned 40 cars, tank cars, is that correct?

A. That is in connection with shipments of coconut oil from the El Dorado.

Q. From the El Dorado?

A. Yes sir.

Q. Now, are you personally informed as to the shipper or consignor of those 40 cars?

A. Yes sir.

Q. You knew personally who shipped them?

A. I obtained the data in connection with the records covering the movement of the cars during that period.

Q. Yes, and it is upon that record that you base the statement that 40 of those cars were so cleaned for the El Dorado during that three year period?

A. It is on the record of our Mechanical Department at Richmond that they cleaned 40 of the cars that moved out [fol. 375] over the Santa Fe from the El Dorado Oil Works during that period.

Q. Do you know what character or type of oil was moved in those cars?

A. Other than it was coconut oil, no sir, just coconut oil.

Q. Just coconut oil. Do you know to what point those cars moved?

A. They moved to transcontinental points mostly.

Q. Well, you don't know the destination?

A. I have the destinations, yes sir.

Q. Would you know whose cars they were, whether they were the cars of any particular manufacturing company?

A. The majority of them are.

Q. Do you know? I ask you first do you know?

A. No sir.

Mr. Williamson: Well, then, if you don't know we won't press that subject.

That is all the questions I have.

Redirect examination.

By Mr. Fort:

Q. Mr. Podlech, did I understand you to say that it was the practice in the San Francisco area during the period we have been talking about for the Santa Fe Railway to clean tank cars upon the request of the shippers that they be cleaned?

A. Yes sir.

Mr. Fort: That is all. Thank you.

[fol. 376] Exam. Sharp: Just a moment.

Are there any other questions?

Mr. Matthew: No.

Exam. Sharp: You are excused, Mr. Podlech.

(Witness excused.)

Mr. Fort: Mr. Smith.

E. S. SMITH was sworn and testified as follows:

Direct examination.

By Mr. Fort:

Q. Mr. Smith, are you also connected with the Atchison-Topeka & Santa Fe Railway?

A. Yes sir.

Q. In what capacity?

A. Assistant car foreman, Richmond, California.

Q. How long have you been that?

A. 18 years.

Q. Do you have any duties in connection with cleaning tank cars?

A. Yes sir.

Q. Are all the tank cars which are cleaned by the Santa Fe in this area cleaned at Richmond where you are the Assistant Foreman?

A. Yes sir.

Q. What are your duties with respect to cleaning tank cars?

[fol. 377] A. Inspection of the work after it is completed and supervising the work during the cleaning.

Q. Are you familiar with the nature of the cleaning?

A. Yes sir.

Q. What is the practice of the Santa Fe Railroad with respect to cleaning tank cars, that is to say, when do they clean them and when don't they clean them?

A. We clean cars whenever we are requested to do so by the shipper.

Q. Now, what is the nature of the cleaning that you give to tank cars which are to be loaded with coconut oil for outbound shipment, and now I am speaking always of the period 1934 through 1936?

A. By that you mean the method we use in cleaning the car?

Q. Yes, the character of the cleaning, the method used in cleaning the car?

A. Well, we use a mixture, a solution of caustic and water and it is siphoned into the car with steam pressure. Then, we rinse the tank thoroughly with clear water and then blow it dry with compressed air.

Q. Blow it dry with compressed air?

A. Yes.

Q. Are there any other shippers of coconut oil in the San Francisco area and were there such shippers in the period we are talking about?

A. The Phil/ip-ine Refining Company shipped coconut oil [fol. 378] during that period.

Q. Did you have occasion during that period to clean any cars for the El Dorado Company?

A. According to my records I cleaned 41, a total of 41 cars.

Q. Including one leased car?

A. Including one leased car.

Q. Now, can you give the number of that leased car and when it was cleaned?

A. G.A.T.X. 7651.

Q. Do you know about when it was cleaned?

A. I have the date; I think it was 11—it was cleaned on 11/7/35.

Q. Did you clean any cars for any other coconut oil shipper in San Francisco during that period?

A. Yes sir.

Q. What other shipper?

A. The only one that I can positively make a statement on is the Philippine Refining Company.

Q. Did they ship substantial quantities of coconut oil at that time?

A. The exact amount I couldn't say, but there were quite a few carload lots.

Q. Do you know whether they ever asked you to clean any of their cars?

A. Yes sir.

[fol. 379] Q. Do you know whether you cleaned them or not?

A. Now, let me correct that to this extent: I was requested to clean a car by our Transportation Department before.

Q. Well, did you ever have occasion to clean any of the cars for the Philippine people during that period?

A. The cars that were used by the Philippine Company?

Q. Yes sir.

A. Yes sir.

Q. What character of cleaning did you give to those cars?

A. The same type of cleaning as I mentioned previously.

Q. In other words, there was no difference in the character of cleaning that you gave for El Dorado cars and the Philippine cars?

A. No sir.

Q. Can you estimate approximately the cost to your company of that cleaning that you have referred to?

A. Yes sir.

Q. What was it?

A. $3.71 per car average.

Q. $3.71?

A. $3.71 per car average.

Q. That didn't include any wiping down with coconut oil, as I understand?

A. No sir.

Q. Do you know whether the El Dorado people after they [fol. 380] got their cars for shipment via the Santa Fe, whether cleaned by the Santa Fe or not, subjected them to any special preparation?

A. No sir, I do not know.

Q. You do not. Did you ever have occasion to see the Philippine people load their cars with coconut oil?

A. Yes sir.

Q. During this period?

A. Yes sir.

Q. Cars which had been cleaned by the Santa Fe?

A. Yes sir.

Q. Do you know whether the Philippine people subjected their cars to any special preparation?

A. The cars that I seen them load they didn't.

Q. In other words, they took the car as cleaned by the Santa Fe and loaded it with coconut oil without further preparation?

A. Yes sir.

Q. You don't know the color or quantity of the oil they were shipping?

A. No, I do not.

Q. Did any coconut oil shippers in the San Francisco area ask you to give the cars any different character of cleaning from what you actually gave them?

A. No sir.

[fol. 381] Q. Is that the same character of cleaning that has been given the cars by the railroad today when asked to clean tank cars?

A. Yes, sir.

Mr. Fort: That is all, Mr. Smith.

Cross-examination.

By Mr. Williamson:

Q. You state that your cleaning process contemplated the use of spraying the car, the tank car with caustic and water?

A. No.

Q. And afterwards rinsing it?

A. No. I said that we use a solution of water in caustic and it is inserted into the tank by a siphon process with steam. It is steam that we use as the pressure to distribute or spray the caustic.

Q. Well, I think we are not far apart. The only thing, I didn't mention the pressure, but you force it in by steam pressure?

A. That is correct.

Q. And I said spraying it, but it accomplishes the scattering of this material in spray form through pressure throughout the inside of the car?

A. Right.

Q. Then, you rinse it?

[fol. 382] A. We rinse it after we have——

Q. With clear water?

A. Yes, sir.

Q. I see. Now, that is all you do?

A. That is all we do just as I have stated.

Q. How long does it take to do that?

A. In the case of a vegetable oil?

Q. I mean an 8,000 gallon tank.

A. An 8,000 gallon tank, if it is a vegetable oil tank previously loaded with vegetable oil or some fat such as tallow, soap stocks, it takes us from one hour to an hour and a half.

Q. And how long a time after you have completed that—you blow that, you dry the inside with hot air, don't you, afterwards?

A. Not hot air, no, just compressed air as it comes out of the pipe.

Q. Compressed air. Now, how long after you have done that do you deliver it?

A. Well, I couldn't say how long after we get through with the tank, that is, the amount of time that elapses between the time we finish the tank and when it is spotted at the plant where it is to be loaded, I couldn't say.

Q. Well, you testified a moment ago that the Philippine Refining Company used the tank cars after you had cleaned them, as you say?

[fol. 383] A. Yes, sir.

Q. Without anything else?

A. Yes, sir.

Q. Now, you say now that you do not know how long after you finished cleaning them they were spotted at the track, at the plant, or the tanks of the Philippine Refining Company. Now, did you ever go there and watch them load the cars?

A. Yes, sir.

Q. When was that?

A. During that period we were cut down on our force considerably and quite often I was called upon to go out to the Philippine Refining to inspect a car for loading other than one I had previously cleaned, so it was while I was at the plant that I saw these cars loaded that we had previously cleaned.

Q. On how many occasions was that?

A. Oh, I couldn't give you the exact number; however, I would say through that entire period that I was called in various times to make inspections at the plant.

Q. Now, the oil that was loaded into those tanks was loaded from what?

A. It must have been from storage tanks because they had a pipe leading into the dome of the tank and it was loaded through this pipe.

Q. Well, it was loaded from a storage tank, wasn't it?

[fol. 384] A. Well, I suppose that it was. I didn't follow the source of the pipe.

Q. You don't know anything about the quality or type of the oil except that it was coconut oil?

A. That is correct.

Q. Now, you have said, you estimated in response to Mr. Fort's question, you estimated the cost of your type of cleaning of cars at $3.71.

A. Yes, sir.

Q. Now, will you break that down and show us how you arrive at that figure?

A. This is an estimate I made—not an estimate—the majority of it is actual. I will call out the part that is estimate.

Q. When did you do that?

A. This check was made over a period extending from March 1st to June 30, 1932. However, that same method was being used during the period in question. It is the only check that I have as a comparison.

Q. I see. Give it to us.

A. Now, steam through a three-quarter inch opening, one hour, at 60 pounds pressure, 90 cents; 25 pounds of caustic soda at 4 cents per pound, $1.00; electricity, an extension cord—this is an estimate—2 cents; the water, approximately 1,000 gallons, 8 cents; rags, 5 cents.

[fol. 385] Mr. Fort: What do you use rags for?

The Witness: Occasionally we used a few rags to gather the moisture at the outlet itself, wiping the outlet pipe.

Air blowing out tank 3/8ths inch opening 90 pounds pressure, one-quarter hour, 30 cents; 2½ hours labor at 43 cents per hour, $1.08; testing the heater pipes, 28 cents; that makes a total of $3.71.

By Mr. Williamson:

Q. Yes. I notice your labor is 43 cents.

A. Yes, sir. We use laborers.

Q. You lived in a happy day. Now, did you ever wipe out an 8,000 gallon tank with coconut oil?

A. No, sir.

Q. Did you ever see a tank cleaned that way at your plant, the Santa Fe?

A. I have never seen them wipe or wash out a tank with coconut oil, no, sir.

Q. Did you ever see anyone wipe a tank with coconut oil?

A. Not during that period, no.

Q. Well, did you ever see it at your plant?

A. Since, yes.

Q. When was that?

A. I can't give you the exact date, but it is within the last six months.

Q. And who was the shipper of the oil there?

A. The Durkee Pure Foods.

[fol. 386] Q. The Durkee Famous Foods?

A. Durkee Famous Foods.

Q. Did you make an estimate of the expense? Was that done under your supervision?

A. That was not done under my supervision, no, but I did see it.

Q. See it done?

A. Yes; that is, I was not inside the tank, but I know that it was done; I saw it.

Q. It is somewhat a more detailed function than pumping the caustic mixture of water in through a pressure pipe?

A. Yes, I would judge there was—as I recall, there was about an hour and a half additional labor.

Q. Yes. You saw that done, did you?

A. Yes, sir.

Q. But you never saw a tank washed out with fresh cocoanut oil?

A. No, sir.

Q. You speak of this tank, G.A.T.X. 7651 —

A. Yes, sir.

Q. Do you know whose tank car that was of your own knowledge?

A. It belonged to the G.A.T.X. people.

Q. Yes, I realize that, but I mean who was the furnisher of the car to the Santa Fe for transportation purposes?

[fol. 387] A. Who furnished it to the Santa Fe?

Q. Yes.

A. The El Dorado Oil Company.

Q. Yes. And that you say was on the 7th of November, 1935?

A. That is correct. That is the day that I cleaned it.

Q. The day you cleaned it?

A. Yes.

Q. Now, what did you do with the cleaning of that car?

A. The same process as I mentioned before.

Q. The caustic soda wash?

A. Caustic soda, steam, fresh water, air.

Q. Do you know whence that car came into the yard at the Santa Fe?

A. The day that it came in? No, I don't know the day.

Q. I didn't say when, but from what place?

A. No, I don't know from what place it came, only that it came on a western movement.

Q. It was westbound?

A. Yes sir.

Q. And westbound it stopped at Richmond, came in on your line, was stopped at Richmond and cleaned?

A. Yes sir.

Q. Then, what did you do with the car, do you know?

A. After it left our place? I don't know that, only that it must have been moved to the El Dorado Works, because [fol. 388] our records show that it came out of there loaded later.

Q. So that car is a car that came from an eastern point empty over your lines to Richmond, was cleaned there, moved as you say to the El Dorado Oil Works, loaded and then moved out loaded eastbound?

A. Yes sir.

Q. But you do not know who sent the car in there?

A. No, I don't know who sent it in.

Q. And when you said it was an El Dorado car you didn't mean to convey to the Examiner that it was a car that the El Dorado sent to you, but it was a car that you sent afterwards to the El Dorado and it was loaded there?

A. It was. What I wanted to make clear is that that is a car that was under lease to the El Dorado that I had orders to clean. That is the point I wanted to bring out.

Q. Well, now, you have brought out a new feature, that it was under lease to El Dorado.

A. Yes sir.

Q. Now, what evidence did you have of that fact?

A. I have a list of the cars that are under lease and that car appeared on that list.

Mr. Ford: Mr. Williamson, I suppose you have available the numbers of the cars that were leased to you at that period and you can check and find if this is one of them?

Mr. Williamson: Well, I haven't myself, but I assume [fol. 389] that we have in the office the cars that are leased, were leased to us, and Mr. Hefferan is here with the list of cars, I presume, that were leased to us.

By Mr. Williamson:

Q. But nevertheless this is a car that came from some eastern point over the Santa Fe empty, stopped at Richmond to be cleaned, and was then sent to the El Dorado Oil Works for loading and moved over the Santa Fe eastbound?

A. Yes.

Q. Do you know where it went?

A. I don't know. Here is one thing I want——

Q. Pardon me just a moment.

A. Yes.

Q. You say you knew it afterwards went out loaded. Now, you must know, then, where it went, don't you?

A. Yes sir.

Q. Where did it go?

A. I will have to check to tell you.

Q. Well, I am perfectly willing to have you check.

A. (Examining documents) I have one movement here, G.A.T.X. 7651 to Gretna.

Q. Mississippi?

A. Well, it doesn't give the state. It just says "Gretna".

Mr. Fort: Does the date correspond?

The Witness: That is what I wanted to—that was in [fol. 390] August; we had that at that time.

By Mr. Williamson:

Q. That was the one, then, that you spoke of. I am looking for this one in November 1935.

A. I think I will have to take back part of that statement. It was a leased car that we cleaned. However, I thought that it had been——

Q. Well, yes, I can well understand you might misremember.

A. I have a record of the movement on that car. I got it mixed up with the months.

Q. You have got a movement in August?

A. Yes sir.

Q. That obviously was not the time. It came in empty in November so I just asked you if you had any information of the movement in November?

A. No, I haven't.

Mr. Williamson: You haven't. All right, then.

Exam. Sharp: Was what you testified about the cleaning period in error?

The Witness: No; the date on the cleaning is the way my records show, 11 7.

Mr. Williamson: I didn't hear that.

The Witness: He asked about whether the date I showed it as cleaned was in error. The date I showed it as cleaned was according to my records.

By Mr. Williamson:

Q. Well, I took it for granted that you showed the date [fol. 391] that it was cleaned correctly.

A. Yes sir.

Q. But that you didn't have available anything to show where it was moved?

A. No, not after that particular movement.

Q. After you delivered it to the El Dorado?

A. No.

Q. You don't know anything about what became of it?

A. No.

Mr. Williamson: That is what I understood you to say. That is all.

Exam. Sharp: You are excused.

(Witness excused.)

Mr. Fort: Mr. Ayres.

David T. Ayres was sworn and testified as follows:

Direct examination.

By Mr. Fort:

Q. Give the Examiner your name, please.

A. D. T. Ayres, A-y-r-e-s.

Q. And you are employed by the Southern Pacific Railroad Company?

A. Correct.

Q. In what capacity?

A. As Car Service Agent.

[fol. 392] Q. And how long have you had that job?

A. Since 1924.

Q. The questions I shall address to you will be directed to the period 1934 through 1936.

A. Yes sir.

Q. Unless I particularly state otherwise.

In your position do you have anything to do with the cleaning of tank cars or supervision over the cleaning of tank cars in the San Francisco area on the Southern Pacific Railroad?

A. Yes sir.

Q. Are you familiar with the practice on the Southern Pacific with respect to cleaning cars during the period in question?

A. Yes.

Q. What was that practice?

A. The practice was to clean cars when requested by the shipper or the tank car owner for the certain commodities.

Q. Was that true with respect to coconut oil shippers?

A. It was.

Q. Was there a coconut oil shipper at that time known as the El Dorado Oil Works?

A. The El Dorado Oil Company, I guess it is the same thing.

Q. Did they have a plant on your line?

A. They did.

[fol. 393] Q. Were there any other shippers from the San Francisco district of coconut oil that you know about?

A. Yes sir.

Q. What were they?

A. Well, I think Dorward & Sons at Richmond and there was Grace & Company at San Francisco.

Q. Was the Southern Pacific requested during this period to clean any tank cars for the El Dorado Company, for example?

A. Well, we did during this period clean cars for the El Dorado Oil Works Company.

Q. How many of their leased cars did you clean during this period?

A. I think roughly about 39 cars, something of that kind.

Q. Did you clean any of the so-called buyers' cars in which the El Dorado made coconut oil shipments?

A. Well, I don't have any record of that, but I think we did.

Q. You checked only the leased cars?

A. No; we would—in this instance I checked only the leased cars, yes.

Q. The 38 cars that you are speaking about that you cleaned, they were all the so-called leased cars to El Dorado?

A. Correct.

Q. Are you familiar with the character of the cleaning or [fol. 394] is someone else more familiar with that?

A. No, I am not familiar with that at all.

Q. Were you in contact with representatives of these coconut oil shippers?

A. Yes sir.

Q. You dealt with them?

A. Yes sir.

Q. And requests for cleaning came from them through you in some instances?

A. They did.

Q. Were you requested to clean any cars for any other coconut oil shippers aside from El Dorado during that period?

A. We were.

Q. What other companies?

A. The Dorward & Sons, W. R. Grace & Company.

Q. And you cleaned their cars upon request also?

A. We did.

Q. What is your practice today? The same as it was during that period?

A. Identical.

Q. Identical?

A. Yes.

Q. During that period, or subsequent to that, did any of the coconut oil shippers in the San Francisco area ask any kind of cleaning different from the kind you gave on their [fol. 395] cars?

A. No, not that I have any recollection of. They merely mentioned to clean them for coconut oil.

Q. Merely mentioned what?

A. They merely mentioned—when they made the request they asked them to clean it for coconut oil when they were to be used for that commodity.

Q. You did wipe down the cars with the coconut oil?

A. I couldn't answer that. The mechanical men have to take care of that.

Q. When the shippers spoke to you they said they wanted it rubbed down for coconut oil?

A. They said they wanted it cleaned for coconut oil.

Q. You in turn transmitted that to your Mechanical Department?

A. To the superintendent's office who in turn transmitted it to the Mechanical Department.

Q. Yes. Do you know whether, after you cleaned the cars for El Dorado, or any of these other coconut oil shippers, or after you placed cars for them without cleaning, whether, in any case they made special preparation of the cars themselves before they loaded?

A. No, I don't know.

Mr. Fort: That is all.

Cross-examination.

By Mr. Williamson:

Q. Now, Mr. Ayres, you had nothing to do whatever with [fol. 396] the cleaning of the cars yourself?

A. None whatever.

Q. You only know that you told the superintendent of the Mechanical Department to have them cleaned?

A. That is right, yes.

Q. You don't know what was done technically in the way of cleaning?

A. No sir.

Q. Do you know the number of cars of cocofnut oil shipped out of the San Francisco Bay area during the period that you speak of?

A. No sir.

Q. Do you know the number of cars that the El Dorado Oil Works has shipped every month during that period of coconut oil?

A. No sir.

Q. You do know, though, that it is a substantial monthly shipment of cars?

A. I know that they make quite a few shipments, yes.

Q. What do you mean by "quite a few shipments"?

A. Well, I would say some days as high as five and six, and some days less.

Q. 150 cars a month is nothing out of the way?

A. I couldn't say to that unless I figured it up. Some [fol. 397] days I know they have as high as five cars go out; some days I have seen three go out.

Q. I see. Now, then, do you know the ratio of the cars that were cleaned to the total number of cars that were shipped out by El Dorado Oil Works?

A. No sir, I have no idea.

Q. Well, you do know, however, that the shipments were a great deal more than the number that were cleaned?

A. Well, as far as leased cars I do know that they shipped more than we cleaned, yes.

Q. Now, you were asked by counsel and you answered that you cleaned leased cars.

A. Yes sir.

Q. I see. You have a list there. What does that list purport to cover?

A. This covers the cars that were under lease that we cleaned during the years of 1934, '35 and '36, that were under lease to the——

Q. And where did you get——

Exam. Sharp: Wait a minute. Finish your answer. Under lease to what?

The Witness: Under lease to the El Dorado Oil Company.

By Mr. Williamson:

Q. All right. Now, where did you get the list of those leased cars?

A. I was furnished the list of leased cars by our law department.

[fol. 398] Q. By your law department.

A. Yes sir.

Q. And where did the law department get them, do you know?

A. I don't know.

Q. Now, you speak of cleaning 39 leased cars. So that counsel may be sure I am going to ask you this question: When did you get that list?

A. Oh, about two or three weeks ago.

Q. Two or three weeks ago?

A. Yes.

Q. So that your law department of the Southern Pacific furnished you with a list of leased cars leased by the El Dorado Works during 1934, '35, '36, two or three weeks ago?

A. That is correct.

Q. And upon that basis you have made your checking?

A. That is it.

Q. All right. Now, when were those leased cars cleaned?
A. In 1934, '35 and '36.
Q. How many were cleaned in 1936?
A. Approximately, well, 17, I think.
Q. 17 in 1936. Now, how many in '35?
A. About 16.
Q. All right.
A. And the balance in '36.

Exam. Sharp: Off the record.

[fol. 399] (Discussion off the record.)

Exam. Sharp: Mr. Ayres, will you read again the numbers and years in which these cars were cleaned?
The Witness: It shows here 17 in '34.
Exam. Sharp: Go ahead.
The Witness: 16 in '35 and the balance, I think, was in '36.
Mr. Fort: How much was the balance?
The Witness: Six cars; yes, six cars, that is correct.

By Mr. Williamson:

Q. Now, you said Dorward & Sons had you clean some cars.
A. Yes sir.
Q. And where were those cars?
A. They were cleaned at Oakland.
Q. Yes, and what became of them?
A. They went back there; I presume they went back to that plant. You see, we move them from Richmond to Oakland to clean. They go back out there to load.
Q. That is the tank on San Pablo Point?
A. Yes, that is it.
Q. Now, when were those cleaned?
A. Well, they have been cleaning them for years.
Q. No, but you speak of some that were cleaned during this period.
A. Well, I couldn't exactly say the exact date, but all [fol. 400] during the period they asked us to clean cars for them.
Q. But you didn't check to see how many of those were cleaned?
A. No.
Q. Have you any record to show?

A. I haven't any unless we check that up; it would l quite a job to do that.

Q. You spoke of W. R. Grace & Company.

A. Yes.

Q. Now, when did you clean a car for them?

A. We have been cleaning cars for them for years.

Q. No; when did you clean a car for——

A. I couldn't give you the individual date unless I che that.

Q. How many cars did you clean for W. R. Grace & Co pany?

A. I couldn't answer that.

Q. Can you say whether it was in the year 1937 or '34?

A. We cleaned them in 1934, '35 and '36, '37, '38 a '39.

Q. And you spoke of these leased cars that were clean for the transportation of coconut oil. Now, I assume th Dorward & Sons cars, which were the agents for the Philip pine Refining Company, were for coconut oil?

A. Yes.

Q. Now, for what commodity were the Grace cars cleane

A. Some of them for coconut oil, for wood oils and vario [fol. 401] commodities of that kind.

Q. Now, if I should tell you that Grace & Company nev handled any coconut oil in those years, you would think th possibly your information was incorrect and they used the for other oils?

A. Well, that might be, yes.

Q. Now, isn't it a fact that they first moved petroleum oi

A. I couldn't answer that, what they moved.

Q. And that they moved imported wood oil?

A. That is correct, yes.

Q. And I don't think they ever moved any coconut o

A. Well, they certainly ordered the cars cleaned som times; they would say clean them for coconut oil and hi class vegetable oils.

Q. You say they did order them?

A. Yes.

Q. For vegetable oils?

A. Yes, that is correct.

Q. What kind of vegetable oils did they mention?

A. I couldn't answer that.

Q. When they ordered it for vegetable oil you are rather assuming, are you not, Mr. Ayres, that they wanted it for coconut oil?

A. No, I wouldn't necessarily say that. If they would [fol. 402] say vegetable oil we would make the order read that way, vegetable oil.

Q. If they said vegetable oil what would you think, what kind of oil?

A. I couldn't answer that either.

Q. Would you think sesame oil?

A. Maybe.

Q. Or would you think Perilla oil?

A. Maybe.

Q. Soy bean oil?

A. Maybe.

Q. Imported cottonseed oil?

A. Yes sir.

Q. Any one of those vegetable oils?

A. Yes, that is correct.

Q. You don't know exactly what for?

A. No.

Mr. Williamson: That is all.

Exam. Sharp: You are excused.

(Witness excused.)

Mr. Fort: Mr. Dulgar.

William Dulgar was sworn and testified as follows:

Direct examination.

[fol. 403] By Mr. Fort:

Q. You are employed by the Southern Pacific, Mr. Dulgar?

A. Yes sir.

Q. What is your job?

A. At the present time I am employed as car inspector.

Q. Car inspector.

A. Yes sir.

Q. At what point?

A. West Oakland.

Q. West Oakland?

A. Yes sir.

Q. Are you familiar with the character of cleaning which the Southern Pacific gave to tank cars in the period '34 through '36?

A. Yes sir.

Q. Will you explain how you cleaned cars when you were called upon to clean them for loading with coconut oil?

A. As to the method of cleaning used?

Q. As to the method of cleaning used, yes sir.

A. We would clean with caustic soda. Caustic soda was put into the tank, a hundred pounds, 5 gallons of coal oil, live steam was entered into the car through the dome through a ¾ inch steam outlet. The car was let steam over a period of 2 to 3 hours, possibly longer if the car was [fol. 404] dirty at the time of inspection. Then, the discharge pipe was opened and that solution allowed to drain out, that car washed down with fresh water and to a point where it was cool enough for a man to enter. The car was entered and inspection made, and if it was clean enough it was dried up with compressed air and rags were used to complete the drying where necessary.

Q. During that period did you clean any cars for the El Dorado Oil Works?

A. Yes sir.

Q. Did you clean any other cars for coconut oil shippers in the San Francisco area?

A. Yes sir.

Q. Did you use the same process in cleaning the cars for all the different shippers?

A. Yes sir.

Q. Now, after you had gone through the steps which you have detailed in connection with the El Dorado cars, did you or did you not wipe them out with coconut oil?

A. Upon their request all cars were wiped in coconut oil.

Q. Was that a routine matter during that period?

A. Yes sir.

Q. Well, now, explain what that amounted to in addition to what you have already said. What did you actually do when you say you wiped out the cars with coconut oil?

[fol. 405] A. Heated the oil to a liquid form, sprayed it in the car with an air compressor, paint spray gun, all over the interior of the car, coils and all.

Q. And where did you get the coconut oil?

A. To my knowledge, it was furnished by the El Dorado Oil people.

Q. About how much did it take for a car?
A. About 3 gallon.

Exam. Sharp: How much?
The Witness: Three gallon.

By Mr. Fort:

Q. Now, what was the cost to you approximately of this cleaning of tank cars during this period, including the wiping down with coconut oil?
A. Approximately $6.
Q. Without the labor of having it wiped down with coconut oil have you any idea? What would your estimate be?
A. I would say $5.
Q. Wiping down cost about a dollar, you think?
A. Yes sir.
Q. Did you wipe down anyone else's cars except El Dorado?
A. During this period we did not, no.
Q. What is your practice with respect to cleaning there now? Is it any different from what you have described?
A. The same method is used today as then.
Q. Including the wiping down with coconut oil for El Dorado?
[fol. 406] A. Yes sir.
Q. Do you wipe down with coconut oil for anybody else?
A. I understand they do at the present time for the Durkee people.
Q. What do you mean by "you understand"? Do you know it?
A. No sir, only from verbal conversation.
Q. Well, at this time you don't have charge yourself of that cleaning?
A. No sir.
Q. I see. But your information is a wipe down for Durkee?
A. Yes sir.
Q. In the same manner that they wipe down for El Dorado?
A. Yes sir.
Q. Did you come into contact with any of the El Dorado representatives or employees in connection with cleaning their cars?

A. No sir, not in cleaning their cars.

Q. Was there any complaint by any coconut oil shipper during this period of the character of cleaning which you gave to cars, tank cars, to be loaded with coconut oil?

A. No complaint as to the character of cleaning made, no sir.

Mr. Fort: I think that is all, Mr. Dulgar.

Cross-examination.

By Mr. Williamson:

Q. You say you are car inspector at the Southern Pacific [fol. 407] at West Oakland?

A. At the present time, yes.

Q. At the present time?

A. Yes sir.

Q. How long have you been in that capacity, that position?

A. At different times.

Q. Well, just now, your present employment?

A. I have been 13 years employed by the Southern Pacific at West Oakland.

Q. Yes, I will grant you that, but how long as car inspector?

A. Three years at the present time.

Q. I see. And before that what did you do?

A. Lead workmen in charge of repairs and cleaning of tank cars.

Q. Now, when was the last that you had to do personally with the cleaning of tank cars?

A. The last part of '37, some time.

Q. The last part of '37. How long before that had you been continuously cleaning tank cars?

A. At different periods of time since 1930.

Q. Since 1930? All right. Now, you spoke of cleaning cars for El Dorado. During this period, 1934, '35 and '36, do you recall cleaning cars for them at that time?

A. Yes sir.

Q. Do you recall specifically any cars that you cleaned at [fol. 408] that time?

A. Oh, I couldn't quote you numbers without looking at my records that I made at that time.

Q. Have you your records here?

A. Some of them, yes sir.

Q. Well, do you recall any specific car that you cleaned for the El Dorado Works at that time, during that period?

A. No sir, I wouldn't quote no numbers.

Q. All right. Now, where did you get the cars that you cleaned for the El Dorado Works?

A. Delivered to the repair track by the Transportation Department.

Q. Yes. Do you know where the cars came from?

A. No sir.

Q. What?

A. No sir, I would not know that.

Q. You wouldn't know where they came from. Would you know whether they came from Oakland or from San Francisco or from points East?

A. Some of those cars we would receive advance messages on that they were coming and to clean and deliver to the El Dorado Oil Works.

Q. Well, those would be cars that came from out of the state, wouldn't they?

A. Yes sir.

[fol. 409] Q. And aren't those the cars that you have in mind that you cleaned?

A. I cleaned all cars that I was requested to clean.

Q. I know, but when you say you cleaned cars for El Dorado, don't you mean that cars came in from out of state points to be cleaned and delivered to the El Dorado?

A. Yes sir.

Q. Aren't those the cars that you refer to?

A. I beg your pardon. I stated that I cleaned those as well as all cars requested.

Q. I don't mean to misquote you or anything. I am just asking you to explain what you meant. I asked you whether, when you said you cleaned cars for El Dorado, you didn't have in mind these cars that came into the Southern Pacific yards under instructions to be cleaned, to clean them and deliver them to the El Dorado for loading?

A. There were times that I recall messages that said the car would come from El Dorado Oil Works at Berkeley to be cleaned and returned to them.

Q. All right. Now, that is what I want to get. So that all of the cars were not cars that came directly consigned to you and were to be cleaned and delivered to the El Dorado Works, but you say you did receive some cars from El Dorado Oil Works?

A. Yes sir.

[fol. 410] Q. Now, can you recall how many cars you received from El Dorado Oil Works?

A. No, I haven't had——

Q. Can you recall whose cars they were?

A. General American Tank Car Company.

Q. Well, you do recall that, that they were General American Tank Company?

A. Yes sir.

Q. Do you recall that you ever received any cars from any other tank car company?

A. Yes sir, there were cars of different ownership cleaned for them.

Q. Well, did you ever receive any cars from the Best Foods Company to be delivered at El Dorado?

Exam. Sharp: From whom?

Mr. Williamson: Best Foods.

A. I couldn't answer that question.

By Mr. Williamson:

Q. That is all right, then. Do you recall that you ever received any from the Glidden Company?

A. To my knowledge I don't know of any cars owned by the Glidden people.

Q. Well, now, you can answer my question if you remember it. If you don't it is all right too. I am just asking you whether you remember.

A. I have no knowledge.

[fol. 411] Q. Now, do you remember receiving any cars from Armour & Company?

A. Yes sir. There were Armour cars cleaned, I remember that.

Q. Were they delivered to the El Dorado?

A. Yes sir.

Q. Any from Swift & Co.?

A. Yes sir, I believe there were.

Q. Any from the Iowa Soap Company?

A. I can't recall that name.

Q. Any from Proctor & Gamble Company?

A. Yes sir.

Q. You do recall that?

A. Yes sir.

Mr. Fort: Mr. Williamson, you bear in mind that Mr. Ayres testimony with respect to 30 some cars has to do with leased cars that were cleaned, and what is coming out now has to do with other cars in addition to those.

Mr. Williamson: I am not talking about Mr. Ayres testimony, I am talking about the testimony of this gentlemen. Don't mislead yourself because I have it clearly in my mind.

Mr. Fort: I don't want anybody to be misled about it. This witness is a witness who cleaned the cars that Mr. Ayres was talking about.

By Mr. Williamson:

Q. Now, how many leased cars, cars leased to the El Dorado Company did you clean during those three years? [fol. 412] A. 38 cars, I believe the statement was made.

Q. Well, who made the statement?

A. Mr. Ayres, from our records that he got.

Q. So Mr. Ayres depends upon you and you depend upon Mr. Ayres, is that right? Haven't you a record of how many you cleaned?

A. Yes sir.

Q. Where is it?

A. In my pocket.

Q. Let's see it, bring it out.

A. (Producing document).

Q. Now, that is a list of cars. What does it say? What is that, a list of cars?

A. Do you want me to read this, what I have written?

Mr. Fort: Just answer Mr. Williamson's question.

By Mr. Williamson:

Q. Say what your list is. Maybe I can see it and shorten the time.

A. I can read it to you if that is what counsel wants me to do.

Mr. Fort: Just try to answer the question.

What is your question, Mr. Williamson?

Mr. Williamson: I asked him what that list was.

Mr. Fort: Now, you are getting into the same thing we were talking about. You asked the witness if he had a record of the cars he cleaned, didn't you?

[fol. 413] Mr. Williamson: Yes.

Mr. Fort: He said he had. Now, if you want to know anything about the cars that were cleaned I think it calls for another question.

Mr. Williamson: No; he has a list. I have asked him to identify his list.

The Witness: I have a list here of leased cars cleaned during the period '34, '35 and '36.

By Mr. Williamson:

Q. Did you make up that list yourself?

A. Yes sir.

Q. The list of the cars?

A. Yes sir.

Q. When?

A. From my records of that time within the past few days. I don't recall the exact dates.

Q. Then, you went to some records of the cars that you cleaned during those years and made up this list?

A. Yes sir.

Q. Now, is that all of the cars that you cleaned during that period?

A. No sir, only the leased cars.

Q. Now, where did you get the information from which you say that those were leased cars?

A. At certain periods of time I believe we have stuff come out that tells us what cars are leased to the El Dorado Oil Works.

[fol. 414] Q. Oh, you have that information certain periods of time?

A. Yes sir.

Q. But I am asking you about this particular information.

A. I was furnished a list by my immediate supervisor.

Q. You got the information from your immediate supervisor?

A. Yes sir.

Q. Who is he?

A. H. D. Poirier.

Q. All that you know, then, as to the cars being leased cars is the information you got from Mr. Poirier?

A. Plus my checking against the list of cars that were leased to the El Dorado people at that time on our files.

Q. Now, you were asked whether you received any complaint, or whether any complaint was made to you about the cars that were cleaned by you?

A. Yes.

Q. Isn't it a fact that some cars were returned to you after you had cleaned them?

A. With no complaint of the cleaning. The complaint was the fact that the cars had been too long a period of time between my cleaning and before they received them on their tracks, and they had——

Q. Well, in other words, that the cars did not reach the El Dorado Oil Works in proper condition from their viewpoint?

A. I would not say——

[fol. 415] Q. That is the objection?

A. I would not say reach them in time. I understand that they have a track that they put these cars in. To my knowledge they might not be taken into their plant for several days after they were delivered to them.

Q. Well, to make it perfectly clear the El Dorado Oil Works returned cars to you with the statement that they couldn't use them?

A. There has been a few instances, yes sir.

Q. How many?

A. I can't make any estimate.

Q. Then, what did you do with those cars?

A. Live steam to take the rust out of them; that is all that was necessary.

Q. Then rust had accumulated between the time that you had previously delivered them and the time they returned them to you, and you put in live steam in order to take the rust out, that is correct?

A. Put live steam into them, washed them out and dried them again.

Q. Then, the next thing, you say you were asked—when you were asked you rubbed down the same car with coconut oil?

A. Yes sir.

Q. How many times were you asked to do that?

A. In practically all instances, I believe, they were rubbed [fol. 416] down for the El Dorado people.

Q. Rubbed down — what?

A. Rubbed down with this coconut oil.

Q. Well, now, how many times?

Mr. Fort: He said in practically all instances.

Mr. Williamson: Let him answer, please.

Mr. Fort: He has already answered.

Mr. Williamson: You don't have to answer.

Mr. Fort: Nobody has to answer all over again.

Mr. Williamson: I want to be sure we understand each other.

By Mr. Williamson:

Q. How many times?

A. I believe we do—I have answered it—in practically all cases.

Q. You believe you do in all cases?

A. In practically all cases. I gave you that answer.

Q. That was up to the time that you ceased to operate as a car cleaner?

A. Yes sir.

Q. Now, where did you get the coconut oil that you did that with?

A. The direct source of that coconut oil at all times I can't say.

Q. Well, you didn't carry it over there in the safe, did you, so you must have gotten it some where? Don't you [fol. 417] know where you got it?

A. If counsel will give me time I will try to explain.

Q. Do so.

A. At times that coconut oil will be furnished by our store department to us, other times through the store department delivery it has been given to the store department trucks from the El Dorado people and brought direct to the tank yard for that purpose.

Q. Now, how much did you say was used for cleaning a car?

A. Approximately 3 gallons.

Q. Then, the El Dorado Oil Works would bring 3 gallons to your place for washing a car, for wiping down a car?

A. I said——

Q. When it was brought to you?

A. When it was brought to me; they would deliver it to me in 5 gallon tins for that purpose, yes sir.

Q. Now, can you recall a single instance when they ever brought you 5 gallons of coconut oil with which to wipe down a car?

A. Do you mean by that that it was delivered to me by our store department, as I stated, or whether the El Dorado people brought it?

Q. The El Dorado Works, I am talking about, what you know yourself, not what somebody told you, just what you yourself know. When you said they delivered it to you sometimes, I assumed that you meant they delivered it to [fol. 418] you. Now, did they?

A. Pardon me, Mr. Examiner, he has not answered my question on this point yet, that I want to know whether he means the means of delivery that I said, or whether he is trying to say that the El Dorado Oil people delivered it to me.

Exam. Sharp: Well, I don't know either.

Mr. Williamson: I am afraid if the Examiner followed my question you would, because I asked him delivered to him by the El Dorado Oil Works. Now, that is a perfectly plain question.

The Witness: That question I can answer, by the El Dorado Works: I have no knowledge of them ever delivering any oil.

Mr. Williamson: Well, that is what we thought. Now, that is clear.

By Mr. Williamson:

Q. Now, when you say that it cost $6 for you to clean a car with the wiping down in coconut oil and $5 to clean the car without doing so, you allow apparently a difference of $1 for the expense of wiping it down with cocoanut oil?

A. Yes sir.

Q. All right. Now, let's see how you arrive at that $1 difference.

A. The labor of applying cocoanut oil to the interior of the car, rubbing it down.

[fol. 419] Q. Do you make any allowance for the cocoanut oil you use?

A. As I have stated, the cocoanut oil is furnished. There was no cost, to my knowledge, of the cocoanut oil.

Q. Well, cocoanut oil costs something, and in your figure you didn't allow, then, for the cost of the cocoanut oil?

A. The cocoanut oil cost us nothing; it was furnished.

Q. Well, you said you had no knowledge of the El Dorado ever furnishing any, but if the company got it, the South-

ern Pacific Company, it had to buy it, it couldn't steal it, so don't you allow any value for the coconut oil that was used?

A. I would suggest to answer that question that counsel would have the store department furnish you a record of where they obtained the oil.

Q. Well, you can make your suggestion to the Examiner. I am asking you if you had made any allowance for the value of the coconut oil that was used?

Mr. Fort: Well, the witness said on direct, and he said several times on cross that he didn't.

Mr. Williamson: No, you are mistaken, Mr. Fort; he didn't. If he had said it I wouldn't be asking him now. I am trying to find out how he arrived at that difference, and I have asked him that question, whether he did allow for the value of the coconut oil, and he says very naively and cavalierly that I can ask the store department of the Southern Pacific Company. Well, I am not doing that at the [fol. 420] moment. I am asking him.

A. I answered the question that the coconut oil was of no cost to me at the time I made the figures. If that doesn't answer it——

By Mr. Williamson:

Q. You, then, allowed nothing for the cost of the coconut oil?

A. No sir.

Q. All right. If I should tell you that coconut oil was itself at a wholesale price worth a dollar and a half, then that figure, the difference in the cleaning of the car would be that much more than you have made it, wouldn't it?

Mr. Fort: He was talking about the cost to the railroad company of cleaning the car.

Mr. Williamson: What did you say?

Mr. Fort: He was testifying, I think, Mr. Williamson, on direct about the cost to the railroad company of cleaning which did not include the cost of the coconut oil.

Mr. Williamson: Well, just for your edification, I will say that the coconut oil cost the railroad company something anyway, whether you think it or not, and therefore, it did enter into it, but he evidently has not taken that into consideration. He doesn't know the cost of it.

By Mr. Williamson:

Q. Now, then, did you ever have experience in washing out a tank car with coconut oil?

A. No sir.

[fol. 421] Q. You never did it at all?

A. No sir.

Q. Have you a separate cost sheet covering the cost of cleaning cars?

A. I don't understand your question.

Q. Well, I mean have you a broken down itemized cost sheet covering the cost of cleaning cars?

A. I have a list here that I made March 9, 1936, covering the cleaning of the 12,500 gallon tank.

Q. Now, what was that car cleaned for, for what purpose?

A. Edible oil or vegetable oil.

Q. What had been in there before?

A. The statement shows "Any light oil".

Q. What?

A. It says "Any oil, any light oil, vegetable oil."

Q. No; what had been in that car just before you cleaned it, do you know?

Mr. Fort: He said a light oil.

Mr. Williamson: No, he said any light oil. The answer didn't seem entirely reasonable.

A. My broken down list here says the cost to clean one 12,500 gallon tank car previously loaded with light oil.

By Mr. Williamson:

Q. Then you think it had been previously loaded with light oil?

A. Yes sir.

[fol. 422] Q. And did you clean that car yourself?

A. Yes sir, supervised the cleaning of it.

Q. What did you do then?

A. Used 100 pounds of caustic soda at 3 cents a pound; 5 gallons of coaloil at 16 cents a gallon; 4 hours live steam through a ¾ inch outlet, 32 cents an hour; 4 hours labor at 38 cents an hour at this time; 1,000 gallons of water at a price of 8 cents per 1,000 gallons; scrap rags and sacks, 50 pounds.

Q. Yes. Now, have you footed those figures?

A. Pardon?

Q. Have you footed them up?

A. And 25 cents shop expense.

Q. All right. Now, have you footed up all those expenses?

A. $6.58 total.

Q. $6.58. Now, you say that that had some light oil in it. Do you know that kind of oil?

A. I mean by that, a light oil, vegetable oil, coconut oil, light lubricating oil.

Q. I was going to ask you whether you meant light in specific gravity or what. You don't know what was in it, do you, except you say it was light oil?

A. Yes sir.

Q. Isn't that correct?

A. I just quoted different oils that I would class as light [fol. 423] oils. It could have been any of those specific oils.

Q. Well, did you make the notation there, light oil?

A. Yes sir.

Q. What would you cover by the expression "light oil"? Would it cover sesame oil?

A. What oils did I mention there in my answer to him? I quoted about oils there, four oils.

(The answer referred to was read by the reporter as follows:

"A. 'I mean by that, a light oil, vegetable oil, coconut oil, light lubricating oil.'")

By Mr. Williamson:

Q. Do you know which it was?

A. I can't say as to what one of them oils was in the car at the time.

Q. All right, that is all I asked you. Now, the fact that it was a 12,500 gallon tank wouldn't indicate that it was coconut oil, would it?

A. No sir; the same method would no doubt be used for coconut oil.

Q. Do you know anything about the standard charge of the Southern Pacific Company for cleaning cars?

A. There was a fixed charge at this time, yes sir.

Q. What is it?

A. $5.50 for light oil and $12 for fuel oils and heavy oils of that type.

[fol. 424] Q. $12 for fuel oil and $5.50 for light oil?

A. Yes sir.

Q. And by "light oil" you mean the same light oils you mentioned a few moments ago?

A. Yes sir.

Q. Has your expense on cleaning cars ever been larger than the figures you have given, do you know?

A. I couldn't state as to that other than my time of supervising.

Q. Well, let's see if I can make it clear. Can you recall any instance where your expense of cleaning the car was greater than $6 or $5.50?

A. There has been cars cleaned that cost more money than that, but I can't recall any special time to mind at the present time.

Q. Well, do you recall any car that was cleaned for a cost of cleaning in excess of $25 a car?

A. I don't care to make any statement on that; I don't recall.

Mr. Williamson: I would ask, Mr. Examiner, that he answer my question.

Exam. Sharp: He says he doesn't recall.

Mr. Williamson: He says "I don't care to make a statement about that".

Exam. Sharp: Did you say you didn't recall?

[fol. 425] The Witness: I did, and followed it with the statement that I didn't recall.

Mr. Williamson: Now, there are two things. If he doesn't recall I can't ask him, but if he says "I don't care to make a statement", I am in my rights in asking him.

Mr. Wedekind: He answered the question. Your question was whether he recalled. He said he didn't recall.

Mr. Williamson: He also said, "I don't care to make a statement", Mr. Wedekind.

Mr. Fort: About what he didn't recall; that is an natural attitude for a witness to have.

Mr. Williamson: Yes, of course, he has several very eminent gentlemen trying to frame it for him. Still, the fact is, I would like him to state what he knows, whether he knows of any instance where the cost of cleaning the car was in excess of $25.

Exam. Sharp: Can you answer that, Mr. Dulgar?

The Witness: As I have already stated.

Exam. Sharp: If you don't know yourself; just say so; if you do say "yes".

Mr. Fort: Make a direct answer.
The Witness: No.

By Mr. Williamson:

Q. You do not?
A. No.

[fol. 426] Q. Well, what is the highest cost that you do recall ever attaching to the cleaning of a car within your knowledge?

A. We have cleaned fuel oil tanks for Baxter for the movement of creosote and charged actual cost; it ran as high as 18, 19 and 20 dollars per car.

Q. Yes, so a car, then, that carried creosote or fuel oil or gasoline, shall I say, would require considerably more expense to clean than others?

A. I think your question is more like some that you have refused an answer from me on. You say "others".

Q. Never mind arguing with me. You just answer the question or ask the Examiner, if you don't want to, to excuse you. I asked the question.

Exam. Sharp: What was the question?
The Witness: What was the question, please?

(The question referred to was read by the reporter.)

Exam. Sharp: By others you mean a car containing light oil?
Mr. Williamson: Yes.
The Witness: Creosote oil and creosote would curtail more expense, gasoline not necessarily.

By Mr. Williamson:

Q. Now, did you ever clean a tank for the movement of vegetable oils that had previously contained fuel oil or creosote?

A. Yes sir.

[fol. 427] Q. And do you have in mind what the cost of cleaning that car was?

A. I have no records of that cost.

Q. Do you recall what it cost without having the record of it?

A. The cost was far greater than the charges made; I recall that much.

Q. Well, can you give us that figure?

A. No sir, I wouldn't be able to make a figure.

Q. Did you ever clean a car that had mineral acid in it?

A. No sir.

Q. That had been previously used to convey mineral acid, a tank car?

A. No sir.

Q. You did not?

A. No sir.

Mr. Williamson: That is all.

Exam. Sharp: You are excused.

(Witness excused.)

We will take a few minutes recess.

(A short recess was taken.)

Exam. Sharp: The hearing will come to order.

Mr. Fort: Mr. Foster.

WILLIAM M. FOSTER was sworn and testified as follows:

[fol. 428] Direct examination.

By Mr. Fort:

Q. Mr. Foster, what is your employment?

A. Car service inspector for the Western Pacific Railroad.

Q. How long have you been employed by the Western Pacific?

A. Since September 2, 1936.

Q. You have been employed by the Western Pacific since when?

A. I was employed by the Western Pacific where I am now employed.

Q. That is what I mean; what were you doing prior to that?

A. Some years ago I worked for the Santa Fe for seven years. There was a lapse of time that I was doing this, that and the other thing during the depression, as it were.

Q. Have you heard the testimony of the Southern Pacific witnesses and the Santa Fe witnesses to the effect that during the period 1934 through 1936 they cleaned tank

cars for shipment of coconut oil in the San Francisco area when requested to do so?

A. I have heard all the testimony, yes.

Q. Was that also the practice of the Western Pacific?

A. Yes sir.

Mr. Williamson: Well, the witness has said he didn't go there until September 1936, so beyond that it is purely hearsay and incompetent.

By Mr. Fort:

Q. Have you made a special investigation in the course [fol. 429] of your duties as to the practice of the Western Pacific with respect to cleaning tank cars in the San Francisco area during the period January '34 to December '36?

A. Yes, I have made such an investigation.

Q. And based upon that investigation will you answer the question which I asked you previously?

A. Yes.

Q. During that period did the Western Pacific clean any cars for the El Dorado Oil Company and El Dorado Oil Works?

A. Yes, they cleaned 36 cars that were shipped out with coconut oil by the El Dorado Oil Works during that period.

Q. Were those 36 cars so-called leased cars or were they buyers' cars?

A. Five of the 36 were leased cars.

Q. As against——

A. Five of the 36 cars were leased cars.

Q. And these others were so-called buyers' cars?

A. Yes sir.

Q. And was the nature of the cleaning which the Western Pacific gave those cars substantially the same as that testified to by the Southern Pacific people?

Mr. Williamson: I think that is objectionable, Mr. Examiner. "Substantially the same" calls for his opinion. Let him state the facts.

Mr. Fort: I will withdraw the question.

By Mr. Fort:

Q. State very briefly the nature of the cleaning which [fol. 430] the Western Pacific gave to those cars?

A. My investigation developed that the cars were cleaned with steam, caustic soda, as you may call it, although I

think our company calls it by the name of "O'chemical", but it is practically the same as caustic soda; it is practically the same as caustic soda in nature.

Q. Did your company wipe those cars down with coconut oil?

A. No, they told me not.

Q. They did not?

A. No.

Q. Were there any other coconut oil shippers from the San Francisco area who shipped via the Western Pacific during that period?

A. There was a little, very little, though. In going through the records I found that there were other coconut oils shipped, but I didn't take that information. I was primarily interested in the cars that were shipped by the El Dorado.

Q. Did you clean any cars for those other oil shippers?

A. There were other tank cars cleaned at that time. The records did not show what was going to be logded in them after they were cleaned.

Q. Under the practices of your company during that period would the same type of cleaning be given for the cars of all coconut oil shippers in the area who have to have their cars cleaned?

[fol. 431] A. Yes, any car for coconut oil would be cleaned in the same manner regardless of who the shipper may have been.

Q. What was the approximate cost to your company of that type of cleaning?

A. From the information I got it was approximately $6.00 per car.

Q. You don't know whether — that period you cleaned any cars for Durkee or Grace?

A. I could not say.

Mr. Fort: That is all.

Cross-examination.

By Mr. Williamson:

Q. When you said that you cleaned five leased cars, your record showed of 36, what did you have to base your statement on that you cleaned five leased cars?

A. I had the car numbers of the cars that were leased to the El Dorado Oil Company by the General American Tank Car Company during those years.

Q. Where did you get that information?

A. I got it with the entire rest of the file when the file was given to me to get the details of the loading of coconut oil.

Q. And when was that given to you?

A. About two weeks ago.

Q. Two weeks ago. In anticipation of this proceeding you were to check those records, were you?

[fol. 432] A. I went and checked all the records of the coconut oil that was shipped, yes sir.

Q. Now, you speak of coconut oil. You put coconut oil in a different classification from other oils, do you not?

A. Well, I just go according to the waybill, the waybills of coconut oil; that is coconut oil to me. I don't know what grade it might be.

Q. You were looking only for coconut oil in your records here?

A. That is right, and just from one company.

Q. Just from one company?

A. Although I, in passing through the records, I found that there were a few scattered cases of other shippers.

Q. But on the average there was one car a month cleaned in over the three years, 36 cars you stated?

A. There was a total of 36 cars. Now, whether that averages one car a month, or whether there was a whole lot cleaned one month and the next month none——

Q. I was doing a little mathematics.

A. I do know of the leased cars three of them were cleaned in 1934, one was cleaned in 1935 and one was cleaned in 1936.

Q. And you do not know whether those cars that you referred to as leased cars were cars that were previously in the coconut oil business, or had just been recently de-

[fol. 433] livered for use in the coconut oil business?

A. (No response.)

Q. In other words, whether they were replacements or whether they were cars that had been used before?

A. No, I couldn't say prior to their cleaning what they were loaded with, the records did not show that, but it did show that, for instance, a car would move out with coconut

oil and maybe I know of one instance within about a month it moved out with coconut oil again.

Q. Out over the Western Pacific tracks?

A. Yes, this is the Western Pacific; I don't know anything about the other two roads.

Q. When was that?

A. I believe it was in 1935, although I have the record; I could give you the car number if you wished to have it.

Q. Then, it had to be switched over from the Southern Pacific to the Western Pacific?

A. Not necessarily. The car may have been brought in Western Pacific; I would say that it did, because it went out the previous time. If it had went out S. P. I wouldn't have known it went out. The next time it went out Western Pacific again so it didn't have to be switched over except in the switch that moves to the plant out in the Berkeley area.

Q. Well, at that time the Western Pacific had no connec-
[fol. 434] tion with the El Dorado Oil Works plant?

A. How was that again?

Q. It had no direct connection?

A. No.

Q. But it had to go out on the switch, that is what I meant?

A. Yes sir.

Q. Your company never cleaned a car, an 8,000 gallon tank car equipped with coils by washing it with coconut oil?

A. I didn't hear of one. I presume our mechanical-man could probably tell better about that than I could.

Q. I am just asking you whether you know?

A. As far as I know, I don't think so; I didn't hear that they had.

Mr. Williamson: That is all.

Mr. Fort: That is all. That is our last witness.

(Witness excused.)

Mr. Matthew: Preliminarily, if the Examiner please, may I ask counsel if it will be agreeable to accept as statements of fact the allegations of Paragraphs 1 and 2 of our intervening petition which relate to the capacity of the intervener, General American Transportation Corporation, and sets forth that the General American Transportation Cor-

poration is the successor in interest to the General American Tank Car Corporation? I think Mr. Williamson will recognize——

[fol. 435] Mr. Williamson: Well, if you want a stipulation that the General American—what is the present name of it?

Mr. Matthew: General American Transportation Corporation.

Mr. Williamson: General American Transportation Corporation is the successor in interest of the General American Tank Car Corporation, I am willing to so stipulate on the statement that you have previously made to me.

Mr. Matthew: Yes.

Mr. Williamson: And that we have agreed upon in connection with our present conduct or operations.

Mr. Matthew: That is satisfactory to me. I am simply trying to simplify the record, Mr. Examiner, because the General American Transportation Corporation succeeded to the rights and interests of the General American Tank Car Corporation within the terms of this contract, and for the sake of simplicity I will usually use the term General American Company to refer to either company as may be appropriate to indicate.

I will call Mr. Donald H. Smith.

Mr. Williamson: Your request that I stipulate as to the facts in Paragraphs 2 and 3 of your petition to intervene is not involved at present, because we stipulated to that one fact; I didn't stipulate to what is in 2 and 3.

Mr. Matthew: I spoke of Paragraphs 1 and 2, Mr. Williamson.

[fol. 436] Mr. Williamson: 1 and 2, then; we made a specific stipulation.

Mr. Matthew: If there is any distinction to it.

DONALD H. SMITH was sworn and testified as follows:

Direct examination.

By Mr. Matthew:

Q. Mr. Smith, where do you reside?

A. Chicago, Illinois.

Q. Are your services engaged by the General American Transportation Corporation?

A. They are.

Q. Throughout what period have you been in the service of the General American Transportation Corporation or predecessor corporations?

A. Continuously since January 1919.

Q. What is your present capacity?

A. General Traffic Manager.

Q. And how long have you been in charge of the Traffic Department?

A. Since 1929.

Q. Have you been continuously in the Traffic Department of the General American Transportation Corporation and its predecessor companies?

A. Yes, with the exception of about three years I have been engaged continuously in the handling of traffic matters.

[fol. 437] Q. What, in brief, is the nature of your duties and responsibilities as General Traffic Manager?

A. Well, I am in charge of the operation of our fleet of tank cars. I keep in touch with the various shippers using our cars, have supervision over the records and the computation of the mileage earnings and generally matters that would come under the jurisdiction of the Traffic Department.

Q. Are you familiar generally with the various contractual arrangements between the General American Company and users of General American tank cars which were in effect during the years 1934 to 1936 inclusive?

A. Yes sir.

Q. And what practices, in general, were pursued by the General American Company in supplying tank cars to shippers for the transportation of liquid commodities during the years to which I have referred?

A. The cars were furnished in some cases on definite leases for various periods of time, say, for example, three years. In other cases cars were furnished to shippers for particular shipments and not covered by any formal contract.

Q. During this period, 1934 to 1936 inclusive, was the General American Company in competition with other car owning companies engaged similarly in furnishing tank cars to shippers for the transportation of liquid commodities?

A. Yes.

[fol. 438] Q. Did similar competitive conditions exist during any part of the period preceding the year 1934?

A. Yes, there were similar competitive conditions. For a period of at least 10 years prior to 1934 those conditions existed.

Q. Please state whether, during this period of three years, extending from 1934 to 1936, the General American Company was furnishing tank cars to shippers other than the El Dorado Company for the transportation of coconut oil from points of origin on the Pacific Coast to eastern destinations?

A. Yes, they were furnishing cars to various shippers of coconut oil, some of them under formal contracts, and some for particular shipments.

Q. In the latter case the cars were furnished simply upon the request of the shipper from time to time?

A. That is right, for the particular shipment and not under any formal contract.

Q. I will ask you to illustrate the effects of the competitive forces to which you have referred upon your contractual arrangements with users of General American tank cars.

Mr. Williamson: I assume that the Examiner will consider that that is within the issues here. If the issues are narrowed down to a determination of the right of the El Dorado Oil Works to enforce its contract with the General American Tank Car Corporation, which Mr. Fort asserted [fol. 439] was his understanding of the issues, then, the inquiry of this witness as to competitive conditions with regard to other people in the use of other cars would seem to be wholly foreign to the issue and immaterial.

Mr. Matthew: The question was preliminary, but I am perfectly willing to restrict the question at this time to the effect of the competitive forces upon contracts with the El Dorado Company.

Mr. Williamson: Well, you may want to escape the obligations of your contract by showing that you made the contract because of competitive conditions, but that, it doesn't seem to me, Mr. Matthew, makes the evidence the inquiry material.

Exam. Sharp: The objection is overruled. Proceed.

By Mr. Matthew:

Q. Do you understand the question, Mr. Smith, is now limited to the relations between the General American Com-

pany and the El Dorado Company, the effect competitive conditions had upon your contractual relations had from time to time?

A. As regards the El Dorado Company?

Q. Yes.

A. Well, competitive conditions naturally had an influence on the conditions of the leasing arrangements that we could make both as regards the amount of the car service charge, as well as with respect to the payment of the mileage earnings.

[fol. 440] Q. Now, prior to 1925, or thereabouts, what arrangement was in effect under contracts between General American Company and the El Dorado Company as to the crediting of car mileage earnings?

A. Prior to 1925 under our contracts with the El Dorado Company we credited them only with the mileage to the extent of the car hire.

Q. Was there any change in that practice in 1925 or thereafter?

A. Yes, that is why the competitive—when the competitive conditions entered the picture and we were forced to make our contracts on the basis of crediting them and paying to them the full amount of the mileage earnings.

Q. Now, prior to the year 1934 what was the car service charge per month on cars which were used by the El Dorado Company?

A. Well, we had various contracts with the El Dorado Company over a period of years, but the contract immediately preceding 1934 was on the rate of 32.50 a month.

Q. $32.50?

A. $32.50 per car per month.

Q. And what change was made as the result of the contract which was then entered into?

A. Well, the contract entered into which was effective January 1, 1934, the rate was $27.50 per month, or a reduction of $5 under the rate previously in effect.

[fol. 441] Q. What was the occasion for that reduction in the monthly service charge?

A. Well, we had to make the reduction in order to hold the business, to keep it from going to competitors whom we understood had offered cars at lower rates.

Q. Now, did these competitive conditions have any effect upon contractual arrangements with shippers other than the El Dorado Company?

A. Yes, they did. They often had an effect upon our leasing arrangements. We met the competition wherever we had to. In some cases it had an effect upon the amount of the car service rate and also as regards the payment of mileage earnings.

Q. Now, did this competition make it necessary for the General American Company to provide for the payment over to the shippers of the excess of the car mileage over the car service charges in all instances?

A. No, not in every case. It all depended upon the conditions surrounding that particular lease. In some cases we did not have to enter into a contract of that kind; in other cases we did. It was a matter of meeting the competition.

Q. You have stated that the General American Company has furnished cars to shippers for the carriage of particular shipments from time to time.

A. That is true.

[fol. 442] Q. Upon special request and not under any formal contract?

A. That is true.

Q. I will ask you to explain briefly the arrangements under which the cars are so furnished.

A. Those apply to cases where a shipper calls upon us for a car for some particular shipment. It isn't for a term lease, and it is not covered by any formal contract. This car is furnished for the particular shipment only. We collect and retain the mileage earnings. No money passes between us and the shipper, or the shipper to us.

Q. In such cases is there ordinarily a charge for car hire, or does the practice vary?

A. The practice varies ordinarily. In many cases there is no remuneration one way or the other. In other cases there is a per diem rate or a flat charge per trip. In any event, the mileage would be retained by the General American.

Q. How do you commonly refer to this practice of furnishing a car or cars to the shipper upon special request for particular shipments and not under any formal contract?

A. On assignment.

Q. Furnishing cars by assignment?

A. By assignment, yes.

Q. Are you familiar with the practice which was followed by the General American Company with respect to the pay-

[fol. 443] ment to the El Dorado Company of the excess of the car mileage earnings over the car service charges during the period ending June 1934?

A. I am.

Q. What was that practice?

A. We credited them and paid over to them the total amount of the mileage earned by the cars in their contract service.

Q. You actually paid over to the other company, the El Dorado Company, the excess of the——

A. We paid the full amount.

Q. What change, if any, was made in the practice of the General American Company in this respect after June of 1934?

A. Well, we discontinued the practice of paying the mileage in excess of the car service. When the Interstate Commerce Commission's decision came out in the Refrigerator Car Case, our management consulted counsel and it was decided at that time that it was a violation of the Transportation Act equivalent of a rebate and the practice was discontinued.

Q. And after that time just what was the practice with respect to the crediting of car mileage earnings to the El Dorado Company?

A. We paid them the mileage earned by the cars up to the amount of the car service, and no more than that.

Mr. Williamson: By that you mean the car rental?

The Witness: Car rental is the same as car service.

[fol. 444] By Mr. Matthew:

Q. Please state whether a similar change in practice was made by the General American Company with respect to its contractual arrangements with other users of General American cars?

A. It was.

Mr. Williamson: I think it is wholly immaterial what was done in other cases.

Exam. Sharp: The objection is overruled.

By Mr. Matthew:

Q. The answer?

A. It was discontinued in all cases to whom we furnished cars.

Q. Was any notice given to shippers?

A. Notice was given to all companies with whom we had contracts where it would have any bearing.

Q. Has the General American Company at any time since June 1934 paid over to any shipper any part of the excess of the car mileage over the car hire accruing since the month of June 1934?

A. It has not.

Q. Was a definite line drawn after the month of June 1934?

A. Yes, a definite line was drawn and in the period since then, the 6½ years, we haven't paid over any mileage in excess of the car hire.

Q. Has there been prepared from the records of the General American Company a statement showing the car hire [fol. 445] or service charges and the car mileage earnings which accrued upon the General American cars used by the El Dorado Company during the period extending from January 1, 1926 to September 30, 1940, both inclusive?

A. Yes, such a statement has been prepared and I have it here.

Mr. Williamson: Are you taking that up to 1940?

Mr. Matthew: Right up to date, the end of September 1940.

The Witness: Yes.

Mr. Matthew: If I may make a brief statement at this time, I should explain that this exhibit was not prepared by the witness. The statement was prepared under the supervision and direction of Mr. Kious of the General American Company who is here prepared to authenticate it and to answer any questions about it. I would like to put it in at this time through this witness because I think it falls logically into his direct testimony, if counsel has no objection.

Mr. Williamson: Well, if this witness did not prepare it, why, he certainly can't attest to its truthfulness. If you have a witness who can attest to its correctness and accuracy, then, you can prove it. Then, the question would arise whether the Examiner is limiting the inquiry to that

involved in the pending litigation, or whether you want [fol. 446] to extend it to cover the years which have intervened since December 31, 1936.

Mr. Fort has made the point that this is nothing but the tail end of a lawsuit, and that this Commission is only functioning to help find the result of a lawsuit. Now, that lawsuit involves nothing after December 31, 1936.

Mr. Matthew: Well, I am willing to comply—pardon me.

Mr. Fort: I was simply going to say, Mr. Examiner, that I don't know the purpose of this subsequent period, and I would reserve my objection to the exhibit until I hear what the purpose was, but I do think that the issues in this case are wholly limited to the period ending with 1936. I don't want any inaction on my part to be taken as a waiver of that contention. As I say, I have no idea why this subsequent period is included.

Mr. Matthew: Well, I withdraw the offer of the exhibit now in response to Mr. Williamson's objection that this witness can't authenticate it. I will reserve any comments I may have to make about the exhibit until another witness is produced.

I have one further question to present to this witness.

By Mr. Matthew:

Q. To what extent, if at all, has the El Dorado Company been called upon to make any actual payment to the General American Company for car hire during the years extending [fol. 447] from 1934 to 1936 inclusive?

Mr. Williamson: By that I assume you mean, Mr. Matthew, the car rentals after the initial starting of the contract having been paid out of the car earnings?

Mr. Matthew: Yes, I am asking whether there has actually been any cash payment from the El Dorado Company to the General American.

The Witness: During the period '34 to '36, is that the question?

[fol. 448] By Mr. Matthew:

Q. Yes, '34 to '36.

A. They were not called upon to make any actual payments. The mileage earnings were always sufficient to cover the amount of the car hire.

Q. And what was the case in that respect during the years extending from 1926 to 1933, both inclusive?

A. The same condition. They always had sufficient mileage to cover the car hire. They never made any payments in cash.

Mr. Williamson: Outside of the initial payments before they had any car mileage, you don't mean to say?

The Witness: I think that is going back before 1926.

Mr. Matthew: Cross examine.

Cross-examination.

By Mr. Williamson:

Q. Mr. Smith, have you checked the movements of the cars covered by this lease contract with the El Dorado Oil Works?

A. I haven't checked the individual shipments of the cars, no.

Q. But sufficiently to know that the statement that was heretofore rendered to the El Dorado Oil Works was correct?

A. That is true.

Q. You personally, however, did not make the adjustments or settlements with the carriers in respect of car mileage?

A. No, not personally; it was done under my supervision.

Q. Under your supervision?

A. Yes.

[fol. 449] Q. And you are prepared to state that that was the exact amount that was provided to be so paid by the carriers under the filed and published mileage?

A. Well, to the best of our knowledge and belief the correct amount of money was paid to us by the railroads, if that is the point that you have in mind.

Q. Yes, and that was the only payment that was made to you by the carriers?

A. That is correct.

Q. You had no arrangement with the carriers other than that indicated by their tariffs?

A. No.

Q. And you claimed and received those mileage allowances as the owner of the tank cars?

A. We did.

Q. And according to the reporting marks?

A. Correct.

Q. And you received that mileage, a cent and a half a mile, loaded and in empty movement?

A. That is right.

Q. And you received that on all car movements of the cars, at least, to the El Dorado Oil Works not only up to the time during which you paid the mileage in excess of any monthly rentals due but since then?

A. Yes, that is correct.

[fol. 450] Q. Up to this time?

A. Yes.

Q. And you have paid, as you have stated, none of that in cash and paid to them nothing in excess of what was the offsetting car rental since June, 1934?

A. Yes, that is right.

Q. All right. Now, that is what you had done in the contracts between your company and the El Dorado Oil Works previous to the contract of September, 1933?

Mr. Matthew: What was that?

Mr. Williamson: I will repeat the question:

By Mr. Williamson:

Q. You did exactly in performance of the contract made on September 28, 1933, up to June, 1934, exactly what you had done under your previous contracts with the El Dorado Oil Works over a long period of years?

A. Yes.

Q. So that in effect the contract of September 28, 1933, was just a hook-on and continuation of your previous contracts with that company for the furnishing of tank cars, leasing of tank cars?

A. Yes, that is true, with the exception of the change in so far as the rate is concerned.

Q. Yes. Well, I had that in mind, but I mean you just really have made one contract after another?

A. That is right.

Q. Each for a limited period and each for a given number of cars?

[fol. 451] A. Yes.

Q. And you solicited the business, your company?

A. Yes, we did.

Q. And you know that the full rate called for by the tariffs on the movement of the loaded tank cars was paid always, do you?

Mr. Matthew: I object to that question. It is not at all within the scope of the witness' direct testimony. I think it is immaterial in any event, a question based on freight rates. The witness has not talked about freight rates.

Mr. Williamson: No, he has not. He has checked these. I have asked him the question. Now, the Examiner can rule on it. I think he knows.

Exam. Sharp: I doubt if he does. He isn't connected with the railroads.

Mr. Williamson: Well, he knows. He testified, I think, before that he knew.

A. We know nothing about the payment of the freight charges on the contents of the car.

By Mr. Williamson:

Q. All right. In response to the questions put to you by Mr. Matthew as to the keenness of competition you testified that you had made contracts where you were induced to make price concessions, I assume?

A. Yes, that is right.

Q. By reason of the competition?

[fol. 452] A. That is right.

Q. Do you desire the Commission to understand that you just were coerced into making a contract with the El Dorado Oil Works?

A. No, I wouldn't say we were coerced into making it. We had the business for a number of years and then we were confronted with the competition and found that it was necessary to reduce our car hire to the extent of $5 a month. We did that in order to hold the business.

Q. To hold the business, all right. And then later when the decision or order was made in the matter of the privately owned refrigerator cars you discontinued carrying out your contract with the El Dorado?

A. In so far as paying mileage in excess of car hire is concerned, yes, sir.

Q. You have let them rent the cars but you didn't pay over the money?

A. Well, they already had the cars rented and we discontinued paying the mileage in excess of the car hire.

Q. Are you at all familiar with the movement of these tank cars, I mean the handling of them? That isn't handled in your department, is it?

A It is handled in my department, yes.

Q. Well, you are aware of the fact, are you, that there are various instances where one car is taken out of the 50 that are leased by the El Dorado?

[fol. 453] A. Yes, that is true in some cases.

Q. And replacements are made?

A. Yes, in some cases.

Q. And that has been done throughout the period in question?

A. Not as a general practice, only in cases where it was necessary due to a car being wrecked or some similar reason. Generally speaking, the same cars stay right in the same service during the life of the contract.

Q. But there have been replacements?

A. There have been replacements at times.

Q. And additional cars at times?

A. You mean over and above your contract cars?

Q. Well, the El Dorado contracted to take fifty cars regularly and as many more as it needed in the operation of its business.

A. Yes.

Q. You said that they paid $27.50?

A. Yes.

Q. For everything in excess of the original fifty cars, they have paid $30, haven't they?

A. That is true.

Mr. Williamson: That is all.

Mr. Matthew: I think that is all.

Exam. Matthew: You are excused, Mr. Smith.

(Witness excused.)

Mr. Matthew: I will call Mr. Kious.

[fol. 454] THOMAS B. KIOUS, was sworn and testified as follows:

Direct examination.

By Mr. Matthew:

Q. Please state your name and place of residence.

A. Thomas B. Kious, Chicago, Illinois.

Q. How do you spell your name, Mr. Kious?

A. K-i-o-u-s.

Q. What relation, if any, do you sustain to the General American Corporation?

A. In charge of the billing department.

Q. What is the nature of your duties and responsibility?

A. Among other things, I have charge of the billing of tank car rental and the issuing of mileage credits.

Q. Just a little louder, Mr. Kious. We can't hear you very well.

A. Excuse me.

Q. How long have you held substantially your present position with the General American Transportation Corporation and predecessor companies?

A. Approximately fifteen years.

Q. I show you a statement consisting of two sheets entitled "Comparison of Mileage Earnings and Service Charges on General American Tank Cars in Service of El Dorado, January 1, 1926, to September 30, 1940" and will ask whether that was prepared in your department and [fol. 455] under your supervision and direction?

A. It was prepared in my department under my direction.

Q. From what sources did you obtain the data which is set forth in the exhibit?

A. It is taken directly from the company accounting records.

Q. For example, were the figures which are found in Item 1 and again in Item 4 reproduced exactly from the company's accounts?

A. They were.

Q. And are the other figures simply obtained by derivation from the basic data essentially, Mr. Kious?

A. They are.

Q. Is the statement true to the best of your knowledge and belief?

A. It is.

Mr. Matthews: If the Examiner please, I expect to ask a number of questions about this exhibit but before doing so in detail I think, perhaps, I should offer it at this time so that counsel may be so advised before offering any objection they may have in mind. It might save a little time if I make the offer at this moment and then ask the witness questions in detail later on, so at this time I will offer the exhibit.

Mr. Williamson: A good deal will depend, Mr. Examiner, upon what your judgment is as to the scope of the proceeding. Here is an exhibit that is made up to cover operations eight years before the period involved in the law suit that [fol. 456] Mr. Fort has said is the basis of the present proceeding, and it covers four years thereafter, so that out of the period of fifteen years, twelve years are entirely without the scope of the hearing as involved in the law suit.

Mr. Matthew: Now, if the Examiner please, if I may speak briefly to that objection, I would have anticipated that if we had offered data for the years 1934 to 1936 only there might well have been a suggestion or a comment to the effect that the showing for that period might not be representative of the record of cars owned by the General American and used by the El Dorado Company. In other words, we might have a very special situation in those years. For that reason, it seems to me desirable that at least we should go back into prior years for a sufficient period of time to enable the Examiner to determine whether there was anything unusual in the three-year period which would set it aside from records made in other years.

I likewise have in mind the report of the Commission in the private refrigerator car case to which reference has already been made today and particularly to the findings of the Commission which go to the record of profits, as the Commission has termed them, made by shipper lessees from year to year, and in the light of their experience of profits making renewed contracts and leases—perhaps that is not the expression but that is the substance, in any event—with an assurance of further profits to come. There- [fol. 457] fore, it seems to me that for the two reasons I have indicated we should, at least, put in the showing for the years

preceding the contract period and I am not greatly interested in the record for the years of 1936 on.

I am reminded that there is another factor which enters into an exhibit of this particular character. As the Examiner, I think, will understand, there are adjustments made from month to month, from year to year, because there may be, perhaps, in one period of a year, we will say, or in a lesser period, perhaps, a very great excess of car mileage over car earnings. Now, we may have a period shortly afterward when there is actually a deficiency in the car mileage earnings. They may be less than the car service charges or car hire. Now in that event the surplus, which has previously been accumulated, will be applied against the deficiency of the succeeding months so that the account is carried forward from month to month, from year to year during the term of the contract. Now, in order to have a fair and comprehensive showing of what the cars in the service of El Dorado Company were doing both prior to the contract and during the period of the contract and might be expected to do afterwards as redeveloped by the events we felt that we should make as complete a showing as we could, that might be desired, but as I say, I am not particularly interested in the showing subsequent to the year 1936.

Exam. Sharp: As I understand it, the purpose in showing [fol. 458] the data for the years 1926 to 1933 inclusive and for the years 1937 down to September, 1934, inclusive, is merely for comparative purposes?

Mr. Matthew: Yes, I think that is a fair statement of it.

Exam. Sharp: As such, I think it is perfectly proper and admissible.

Mr. Matthew: May I add just this, Mr. Examiner: That I also expect to argue from the showing which was made for the years preceding this contract period, that is, the period 1926 to 1933, that the phenomenal earning capacity of these cars as expressed in the excess of the car mileage earnings over the car service charges afforded every assurance to the El Dorado Company that upon a renewal of the contract it could continue to obtain what the Commission has classified as profits out of the car mileage charges. That is the only addition I would care to make to what Your Honor said as to——

Exam. Sharp: I think the exhibit shows information which the Commission would like to have and it will be admitted as Exhibit No. 9.

(Exhibit 9, Witness Kious, received in evidence.)

Mr. Williamson: What exhibit number?

Exam. Sharp: It will be Exhibit No. 9.

Right at that point, Mr. Matthew, should not the word in, take, the fourth line of the heading where it says "in serv-
[fol 459] ice of El Dorado," to complete the exhibit, shouldn't it be "Oil Works"?

Mr. Matthew: Well, we used the term "El Dorado" simply for the reason that although the contract was made with the El Dorado Oil Works it was signed, according to the allegations of the complaint, by the El Dorado Oil Works to its wholly controlled subsidiary, the El Dorado Terminal Company, so we have been using the term "El Dorado" to apply to either company as the case may be.

Exam. Sharp: Well, that will be perfectly well understood except as a heading for this exhibit I think it would be more comprehensive.

Mr. Matthew: I would suggest, perhaps, the words "Oil Works" might be added.

Exam. Sharp: You could add "Oil Works" and "El Dorado Terminal Company," if you wish.

Mr. Matthew: Very well.

Mr. Williamson: For the benefit of the record we make no point about it. We are perfectly content with it standing just as "El Dorado." We know what it means.

Exam. Sharp: Well, go ahead.

By Mr. Matthew:

Q. Now, directing your attention to the second item in the exhibit, Mr. Kious, entitled "Average Number of Cars in El Dorado Service per Month," I will ask you to explain the method which you followed in order to determine the average number of cars per month in the service of the El
[fol. 460] Dorado Oil Works or its subsidiary during each of the years in question.

A. From the copies of invoice, the original of which had been previously furnished El Dorado, we found the actual number of cars in service each month of the particular year, struck an average result obtained. We obtained, for ex-

ample, a figure of 65 for the year 1926. In general, fractions were eliminated.

Q. How did you determine the average mileage earnings per car per month as shown in line 3?

A. We took the actual average number of cars in the service of El Dorado Company for the full period of twelve months and by dividing that number into the figures shown in Item 1 we obtained, for example, 54.18.

Q. That is $54.18?

A. That is $54.18.

Exam. Sharp: Now, do I understand, take 1926, for instance, the $52.535, divide by 65? That isn't what you mean?

Mr. Williamson: Yes, that is what he means.

Mr. Matthew: Now, he can explain that.

By Mr. Matthew:

Q. What was your divisor?

A. The actual divisor was 785; that is the actual car months, while 12 times 65 is 780 car months; the actual car months was 785.

Exam. Sharp: As results from dropping fractions, is that it?

The Witness: Yes, that is right.

By Mr. Matthew:

Q. Perhaps we can put it this way: You found in the first [fol. 461] instance, Mr. Kious, that there were 785 car months for the year 1926?

A. That is right.

Q. When you have divided that by 12 you have 65 and a fraction?

A. 65 and 5/12; that would be 65.42.

Q. And you threw away the fractional surplus and retained 65 in the exhibit in Item 2?

A. That is right.

Q. But when you came to make your computation, in order to obtain the figures shown in Item 3 you took the exact number of car months, 785, and dividing that figure into 42,000-odd dollars you obtained the figures shown in line 3?

A. In line 3.

Exam. Sharp: That same procedure was followed throughout the exhibit?

The Witness: Throughout.

Exam. Sharp: All right.

By Mr. Matthew:

Q. Now, how did you obtain the average service charges per car per month shown in line 5?

A. By using the same divisor, that is, 785, the actual number of car months in the service charges, the aggregate service charge which is 23,000.

Q. Yes.

A. Resulting in a figure of $30.11.

Q. And the same process for each of the succeeding years?

[fol. 462] A. Was followed throughout.

Q. How did you obtain the figures shown in Item 7?

A. Simply by deducting Item 4 from Item 1, simply a mathematical calculation.

Exam. Sharp: Doing what, then?

By Mr. Matthew:

Q. You mean dividing 5 from Item 3, do you not?

A. I am sorry. I guess I didn't get your question.

Mr. Matthew: I hope I framed my question correctly. May I have my question? I think I will save time by stating it again.

By Mr. Matthew:

Q. How did you obtain the figure shown in Item 7, line 7?

A. By deducting the figure in Item 5 from Item 3.

Q. I think, perhaps, you had understood my question to relate to the figures in line 6. It was my fault, perhaps.

A. I am sorry.

Q. I will just ask you now to explain how you obtained the figure shown in line 6?

A. That is by deducting the items in line 4 from the items in line 2—the items in line 4 from the items in line 1.

Exam. Sharp: Yes, you said two before.

The Witness: Yes, I am sorry.

By Mr. Matthew:

Q. Briefly, what do you show on the second sheet of this exhibit?

[fol. 463] A. This is merely a summary of the figures that are outlined on the first sheet.

Q. First you have a summary for the three-year period 1934 to 1936, inclusive?

A. That is right.

Q. Then a recapitulation for the entire period covered by the first sheet of the exhibit?

A. That is right.

Q. Have you also prepared under your supervision and direction a statement, copy of which I now show you, entitled "Total Number of Tank Cars Earning Mileage in Excess of Service Charges Compared with (a) Total Number of Tank Cars Owned by General American and (b) Total Number of Tank Cars in Service of Shippers Under Contracts Providing for Crediting Mileage to Car Service Account"?

A. (No response.)

Q. I asked if you prepared that.

A. I did, under my supervision and direction.

Q. From what sources did you obtain the data which was used in the preparation of this exhibit?

A. From the company's accounting records.

Q. Now, directing your attention first to Item 4——

Mr. Williamson: Are you going to offer that because we shall, whether it is your thought or not, we shall object to a general audit or report of the operations of the General [fol. 464] American Tank Car Corporation in respect of all of its tank cars. They couldn't possibly affect the issue here. They may have loaned their cars or may have gotten a high price; they may have lost on some and made on others, but the general result or summary of the results of the operation of the tank cars, the fleet of tank cars belonging to this corporation cannot, in our opinion, have any bearing whatever upon the present matter. We so object.

Mr. Matthew: Well, I haven't yet offered the exhibit but I am perfectly willing to offer it now and then argue the objection.

Mr. Williamson: Well, you have offered it, haven't you?

Mr. Matthew: I think I asked him just whether he prepared it. He said he had.

Mr. Williamson: Then, you began to examine him about it. You can't examine him until you offer it.

Mr. Matthew: Well, I say that I am ready to offer it now and then argue the objection.

By Mr. Matthew:

Q. I will first ask the witness if the statement is true to the best of his knowledge and belief?

A. It is.

Mr. Matthew: Then, I offer that exhibit in evidence.

Mr. Williamson: My objection is already made.

Mr. Matthew: Now, if Your Honor please, accepting for the purposes of my statement, the suggestion that the hearing is to be restricted to the issues indicated by counsel, [fol. 465] without going into that in detail, it seems to me that the Commission should have before it something of a record of the handling of General American cars under service contracts which provide for the furnishing of car mileage to the shipper lessees. I suppose the Commission will want something more than merely a showing of the performance of the cars which have been in the use of the El Dorado Company. I suppose it may be assumed from testimony that has already been given, as is clearly indicated, that the General American Company had, during this particular time, a number of car service contracts which provided in some instances for the crediting of car mileage to the full amount of the car mileage earned and received from the carriers, while in others it simply contemplated the crediting of car mileage to the shipper lessees to the extent of the car rental or car service charges, as we sometimes term them, and not more.

Now, if the Commission is to see this case in its true perspective it seems to me that we should produce from our records that which we have sought to produce here, a statement which will show the extent to which cars which are in the service of shippers under service contracts essentially analogous to the contract with which we are immediately concerned should be before the Commission. That is the purpose of that exhibit. I think it will more clearly appear as I interrogate the witnesses as to what is shown in each item.

Mr. Williamson: The only purpose——

[fol. 466] Exam. Sharp: Let me ask a question, please.

Why have you shown the years '34, '35, and '36 and then the succeeding years down to date in this exhibit and not shown the previous years, that is, the years from 1926 to '33 inclusive?

Mr. Matthew: Yes, I had intended to ask the witness that question. I will submit the question to the witness now.

The Witness: Well, as previously explained by Mr. Smith, we made a change of practice in crediting the mileage after June, 1934, and on the basis of a conclusion reached in the refrigerator car case, from that time on it was apparent it would be necessary to carry the mileage figures forward from month to month, from year to year, as just explained by Mr. Matthew, so that in the year where the mileage was less than the rental the lessee would get the benefit of the previous earnings.

Exam. Sharp: What do you mean by "previous earnings"?

The Witness: Earnings that were greater than the rental in previous years, or previous months. In other words, if in a given month the mileage was a thousand dollars greater than the corresponding service charges that thousand dollars would be set up as a reserve and the following month, if earnings of shipments would fall off and the earnings would correspondingly fall off a thousand dollars, they would get the benefit of that.

Exam. Sharp: That practice has been since when?

[fol. 467] The Witness: Since July 1, 1934, and is in effect today.

Exam. Sharp: Well, now, do I understand by that that you have considered the cars leased by El Dorado Oil Works collectively or have you acted with respect to each car individually in paying or not paying anything above the car rental to the lessee?

The Witness: I am sorry. I didn't follow you.

Exam. Sharp: Will you read it, please?

(The question referred to was read by the reporter.)

The Witness: Collectively. In other words, the rental is pooled and the mileages pooled. The accounting is not rendered on individual cars.

Exam. Sharp: Do you have any opinion yourself as to whether or not that complies with the decision of the Commission in what you refer to as the refrigerator car case?

The Witness: No, I wouldn't have an opinion on that.

Exam. Sharp: Well, I think it is a proper question of counsel rather than you so I won't press that any further.

Mr. Williamson: If the Examiner please, I wanted to point out to you that this exhibit, which is now before you for admission or rejection, is not limited to the cars of the El Dorado.

Exam. Sharp: I understand that.

Mr. Williamson: It is limited to all of the cars of the General American Tank Corporation and, therefore, it is entirely afield from any possible interest that it might have [fol. 468] in this case and which the other exhibit did have, that is to say, as to the cars of the El Dorado Works. They cannot, unless they want to establish or attempt to establish their righteousness by this means, drag all the records of all of their cars before the Commission with any degree of reference to the present issue.

Mr. Matthew: Well, if the Examiner please, and assuming that Mr. Williamson is right in his last suggestion, let me look forward to the time when we may brief or argue this case; this exhibit is not before the Commission and Mr. Williamson says that all we have in this record is a showing of the earning power of the cars which were in the service of the El Dorado Company, and it may well be that other shipper lessees using the cars of the General American Company were similarly making a profit of $50 per car per month. It doesn't appear that any of those shippers are complaining. The General American Company, for purposes of its own—I am suggesting the argument of my opponent, if you please—was unwilling to come to the aid of the Commission by showing what was being done by its cars generally which were in use under similar contracts. Therefore, it must be assumed that all shippers are on an equality, that there cannot be any objection to permitting the El Dorado Company to obtain such profits as it can secure out of the excess of the car mileage earnings over the car hire or car service charges, as we call them. Mr. Williamson has already made it perfectly clear that it is [fol. 469] to be his contention that no matter what his profits during this period over the years he is entitled to it and he asks the Commission in his petition and he asks the Examiner today in this statement to find that it is proper that the El Dorado Company shall enjoy such profits.

Now, it seems to us, and it still seems to me now, that

it is our duty to the Commission to present this sort of a summary of our car service contracts instead of having just the fifty or sixty-odd cars per month represented in the El Dorado exhibit. We now have here in the neighborhood of 554 to as much as 1556 cars per month under all service contracts of this general character including, of course, those of the El Dorado Company. We relate that number of cars to the total number owned by the General American Company in each of those years and we undertake to show in turn the percentage relationship between the cars out of this group which have been earning mileage in excess of the car service charges and the total number of cars, and finally we undertake to show in turn the average total number of cars in the service of shippers under contracts of this general variety and the number of those cars earning mileage in excess of the car service charges.

Now, it seems to me that is significant, something that the Commission should have before it and, in any event, I should be in a position to urge, if I am so minded, that we have not failed to acquaint the Commission as best we can with the showing made by cars in service of shippers under [fol. 470] contracts of a character akin to that of the El Dorado Company. I think it is pertinent.

Exam. Sharp: I understand from what little time I have had to study this exhibit that first of all a very small percentage, that is, ranging from 4, perhaps from 3 to 7 per cent of the owners of the cars of the General American Transportation Corporation earned mileage in excess of the rental value.

Mr. Matthew: True.

Exam. Sharp: Is that right?

Mr. Matthew: Yes.

Exam. Sharp: Then, can we deduce from this exhibit, as it is now, what part of that small percentage I named arose from the profitable cars leased by the El Dorado Oil Works?

Mr. Matthew: That could be obtained, I think, by relating the prior exhibit to this, if I understand Your Honor's question.

Exam. Sharp: I might put it another way: The 5 per cent, 4 per cent, 5 per cent, 7 per cent, 5 per cent, 4 per cent and 3 per cent respectively for the years shown do include the cars operated by the El Dorado Oil Works and upon which they made a profit?

The Witness: That is right.

By Mr. Matthew:

Q. That is true, is it not?

A. They are in there.

[fol. 471] Mr. Matthew: The El Dorado cars are included in there.

Exam. Sharp: I believe that is sufficient, whether I get the rest of it or not.

As I see the exhibit, it does contain information that will be useful to the Commission and it will be admitted as Exhibit No. 10, and Examiner Hinman is an accountant and at the proper time I will ask him to ask Mr. Kious a few questions about it.

(Exhibit 10, Witness Kious, received in evidence.)

By Mr. Matthew:

Q. Now, initially, Mr. Kious, I will direct your attention to Item 4 in Exhibit No. 10 as just received and I will ask you to explain the processes which were followed in deriving these particular figures.

A. By an examination of our records——

Mr. Williamson: What are you reading from there, Mr. Kious? Are you reading from an exhibit?

Mr. Matthew: A memoranda.

The Witness: On an examination of our records we found there were contracts that provided simply for the crediting of mileage to the extent of rental but not in excess of rental. The records were examined in order to ascertain the total number of cars in the service of shippers under such contracts.

Mr. Williamson: That would be under both kinds of contracts?

The Witness: Yes, where it called for the crediting of mileage to the extent of the total mileage.

[fol. 472] Mr. Matthew: Just a little louder, please, Mr. Kious.

The Witness: We then struck an average to obtain the average total number of cars in service of shippers under a particular year under the contracts providing for the crediting of mileage, whether the entire amount, or up to the extent of service charges.

As a result, we find in the second half of 1934 there were 10,720.

By Mr. Matthew:

Q. How did you obtain the figures reported in Item 1 as the average number of cars earning mileage in excess of service charges, etc.?

A. Going through our records we found that certain contracts which provided for the cars operating under certain contracts earned mileage greater than the service charge. This was taken from records and as a result we found that the average number for the last half of 1934 was 554 cars.

Q. Now, I assume that the figure there shown is as nearly as you could determine them the average number of cars owned by the General American in each of those years or periods?

A. That is the average number of cars, yes.

Q. All right. Now, how did you arrive at the percentage figures shown in Item 3?

A. By dividing, using Item 2 as the divisor in Item 1.

Q. Then, how did you obtain the percentage figures in Item 5?

Exam. Sharp: 4, you mean, first? Let's have the fourth one first.

[fol. 473] Mr. Matthew: The fourth one?

Exam. Sharp: You started asking about five. I think you would like to take them as they go.

Mr. Matthew: I thought I had already covered Item 4, if the Examiner please. Perhaps I didn't make that clear.

Exam. Sharp: Pardon me, then.

Mr. Matthew: I started somewhat illogically as it may seem from the appearance of the exhibit. I started with Item 4 and jumped to Item 1 because I thought, perhaps, the basic data should be taken first.

Exam. Sharp: Well, I was making another study at that time. Excuse me; go ahead with Item 5.

By Mr. Matthew:

Q. The last question was as to Item 5.

A. That is the relation of Item 1 to Item 4, using Item 4 as a divisor resulting in a figure of 5 per cent.

Mr. Matthew: Unless the Examiner feels that we have not sufficiently explained that exhibit, I think I could pass it now. I assume that the purpose is clear enough. Showing this average total number of cars in Item 1, that is the

average total number of cars in use under these particular contracts where there was actually an excess of the car mileage over the car service charges and that, of course, is related finally to the average total number of cars owned by General American, which gave the percentage figures shown in line 3.

Then, in turn, we wanted to show the percentage relation, or put it in other terms, the proportion which the cars which [fol. 474] earned the excess mileage bore to the total number of cars in service to shippers under these contracts and that is found in Item 5.

Mr. Hinman: The 65 cars in the first item on Exhibit 9, what item is that in on Exhibit 10? You will have to go over beyond that first year, say the year 1935, Item 2 on Exhibit 9, 56½. In what item on Exhibit 10 would that be included?

The Witness: That is the average number of cars in service. On Exhibit 10 that would be in Item 4.

Mr. Matthew: Pardon me just a moment. I understand the Examiner's question to relate to the number of cars, did it not?

Mr. Hinman: Yes, that is right.

The Witness: That is the average number.

Mr. Hinman: Yes. Of this 14,244 shown in Item 4, Exhibit 10, for the year 1935, 56½ average with the El Dorado cars, is that correct?

The Witness: No, sir. You say of the 14,000?

Exam. Sharp: Is that not correct? Just tell us where it is found in Exhibit 10.

The Witness: Well, that is the average number of cars in service under a contract which provides for the crediting of mileage. On 10 those cars would be in Item 4.

Mr. Hinman: Well, that is what I just said; Item 4 is 14,244.

The Witness: That is right.

[fol. 475] Mr. Hinman: Well, I asked if that 56½ was part of that 14,244.

The Witness: Yes.

Mr. Hinman: The answer is "yes"?

The Witness: That is right. Of course, this is the average and the actual car months, that would have to be multiplied by 12. This is a yearly figure down here and this is a monthly figure here.

Mr. Hinman: I realize that.
Mr. Matthew: May I interject?
Mr. Hinman: Glad to have you.

By Mr. Matthew:

Q. Mr. Kious, in further answer to the Examiner's question, this number of 56½ is the average number of cars in service of the El Dorado Company in 1935 and is included also in the average number of cars shown in Item 1 of Exhibit 10, is it not?

A. That is right.

Q. In other words, the number of cars in the service of the El Dorado Company was about 10 per cent of the total number of cars which you list in Item 1 of Exhibit 10?

A. That is right.

Q. And, of course, the El Dorado cars are likewise included in the number of cars shown in Items 2 and 4 of Exhibit 10? Is that true, Mr. Kious?

A. That is right.

[fols. 476-478] Mr. Matthew: Pardon me.
Mr. Hinman: That has cleared me. Thank you.
Exam. Sharp: Have you any further questions?
Mr. Matthew: I have just one further exhibit and then I will be through. I don't think it will take very long.
Exam. Sharp: Go ahead.
Mr. Matthew: I think I can be through within ten or fifteen minutes.
Exam. Sharp: Just off the record a minute.

(Discussion off the record.)

Exam. Sharp: The hearing will adjourn until 9:00 o'clock tomorrow morning.

(At 6:00 o'clock p.m. the hearing was adjourned to 9:00 o'clock a.m., December 10, 1940.)

[fol. 479] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 28515

In the Matter of ALLOWANCES FOR PRIVATELY OWNED TANK CARS

San Francisco, California,
December 10, 1940, 9:00 a.m.

Before Elroy F. Hinman, Special Agent, Interstate Commerce Commission, F. L. Sharp, Examiner

Hearing resumed.

Appearances:

Same as heretofore noted.

PROCEEDINGS

Exam. Sharp: The hearing will come to order.

Mr. Kious.

THOMAS B. KIOUS resumed the stand and testified further as follows:

Mr Matthew: If the Examiner please, I have concluded that I can materially curtail our showing and save a great deal of time by asking the witness a few questions designed to develop some information which will be supplemental to [fol. 480] the data shown on Exhibit No. 10. By following that course it will not be necessary to introduce any further exhibit, and I think I cannot only considerably simplify the showing, but I hope to be able to conclude my examination of the witness within ten or fifteen minutes.

If the Examiner and counsel have before them this Exhibit No. 10 my questions will be directed primarily to data found on that exhibit and my initial question, as will shortly appear, will be directed to the cars which are shown in Item 4 of that exhibit.

Direct examination (Resumed).

By Mr. Matthew:

Q. Please state the amount of the total service charges on all cars in the service of shippers under contracts pro-

viding for the crediting of mileage to the shippers' car service accounts for the second half of the year 1934 and for subsequent years to and including the month of September 1940.

Mr. Williamson: Mr. Examiner, I don't know whether I made our position perfectly clear yesterday or not and I, of course, am going to bow to your judgment in the matter; you know how far you wish to extend this investigation.

As I understand it, counsel submitted an exhibit here which, in addition to one exhibit 9 referred to the cars leased by the El Dorado refers to all of the cars of the General [fol. 481] American Tank Car Corporation, those that are leased, those that are leased on terms whereby the lessee enjoys any earning in mileage, and those where the lessee has no such enjoyment, so that it is really a summary of what their cars earn.

Now, I can't, as I said yesterday, conceive that that would affect this issue. If the Commission is going to determine whether or not the cars leased by El Dorado Oil Works have been operated at a profit to the lessee, then, that is covered by the statement already rendered, Exhibit No. 9.

If, however, the Commission is interested to know what tank cars produce revenue when in service, then, this evidence doesn't show it. It merely shows the tank cars of the General American Tank Car Corporation, so it is either too full for the narrowed purpose of determining what the El Dorado cars do, or it is too narrow to determine the broader question.

Mr. Matthew: If the Examiner please——

Exam. Sharp: Mr. Matthew, didn't you answer that very same argument yesterday fully?

Mr. Matthew: Yes sir, I think I did.

Exam. Sharp: I believe so. I think we admitted Exhibit No. 10 yesterday.

Mr. Matthew: Yes. I wish to correct just a slight error [fol. 482] in counsel's statement. The cars here are not, as counsel indicated, all cars in service both under car service contracts and under assignment. They are merely the cars which have been in the service of shippers under contracts which call for the crediting of mileage to the ship-

pers' accounts either in its entirety or up to the amount of the car service charges.

Exam. Sharp: It did not include the cars mentioned by a witness yesterday which were merely assigned for trips?

Mr. Matthew: No.

Exam. Sharp: On which the car company kept all the earnings?

Mr. Matthew: No.

Mr. Williamson: In other words, it covers contract, not assignment cars?

Mr. Matthew: That is the first distinction, in the second place merely the cars under those contracts which provide for the crediting of car mileage to the shippers' car service account either entirely or up to the amount of the car service charges. That was clearly brought out, I think.

Mr. Williamson: Does it cover cars that are operated, if any, by the company itself?

Mr. Matthew: No.

Mr. Williamson: All right.

[fol. 483] Mr. Matthew: If there are any such.

Exam. Sharp: Operated by the company, you mean the car company?

Mr. Williamson: Yes. No, he says not.

Mr. Matthew: If there are any such; I don't know if there are.

Mr. Williamson: I don't either. I am just asking you.

Mr. Matthew: I think the matter has been specifically defined and I will submit the question.

A. The second half of 1934, 1,956,950.86.

By Mr. Matthew:

Q. Better read them in dollars.

A. 1935, $4,618,265.14; 1936, $6,158,470.18; 1937, $7,205,615.51; 1938, $6,947,637.98; 1939, $7,430,562.18; the first nine months of 1940 $6,128,329.73.

Q. From what sources did you obtain the figures which you have just read into the record?

A. They are taken directly from the records of the General American Company and represent the total service charges which accrued to the General American Company, the contracts represented in Exhibit No. 10, that is, the contracts which provided for the crediting of car mileage to the shippers' car service account, either in the full amount

of the car mileage or to the extent of car service charges only.

Q. These service charges represent, do they not, the [fol. 484] service charges on the number of cars shown in Item 4 of Exhibit No. 10?

A. That is right.

Q. You have also shown in your Exhibit No. 10, and particularly in line 1 the average total number of cars in the service of shippers under the contracts referred to which earned mileage in excess of service charges as, for example, 554 cars in the second half of the year 1934 as shown in line 1?

A. That is correct, only 554 of the cars in this group earned excess mileage. For the most part, the cars under this service failed to earn sufficient mileage to equal the car service charges.

Q. I will ask you at this time to state the total mileage earnings in excess of the total service charges on all of these cars which earned excess mileage as shown in Item 1 of Exhibit No. 10 for the period commencing with the second half of the year 1934 and ending with the month of September 1940.

A. The second half of 1934, $34,413.64; 1935, $88,452.36; 1936, $173,204.51; 1937, $155,587.83; 1938, $59,728.94; 1939, $73,746.12; the first nine months of 1940, $50,161.04.

Q. I will ask you now to state whether the figures which you have just given, namely, these excess mileage earnings, represent money which has been retained by the General American Company although under the terms of the appli- [fol. 485] cable contracts all of the money was to be credited to the shippers?

A. No, that is not the case. Part of this money was payable to the shipper as in the case of the El Dorado Company because the contract provided for the crediting of car mileage in full to the shippers' car service account, but there are other contracts which, as I have previously explained, provided for the crediting of car mileage to the extent of car service charges and no more. Under such contracts the company was, of course, under no contractual obligation to pay over the excess to the shipper. The money is accordingly only in part money which was payable to the shippers under the contracts.

Q. Is it possible that the figures of total mileage earned in excess of total service charges which you have just given

might be subject to subsequent adjustment as a result of transactions following the period which you have covered?

A. Yes, for the reason stated yesterday. It is our practice to carry forward from month to month and year to year such surplus car mileage as may be earned in view of giving the shipper the full benefit of the car mileage earned up to the amount of total car service charges during the contract period. This means, for example, some particular year the car is used by a shipper under his contract and might yield an excess of car mileage while the following year there might be a deficiency. In that case the excess car mileage deveI- [fol. 486] oped in the prior year would be used to offset the deficiency in the following year.

Q. What proportion of the total service charges under the contracts to which you have referred is represented by the total excess mileage earned by those cars which did, in fact, earn excess mileage during the period in question?

A. For example, I have stated in the second half of the year 1934 total service charges on cars under these particular contracts amounted to $1,956,950.86. Total excess mileage earned by the cars in this group amounted to $34,413.64. This latter figure is 1.8 per cent of such total service charges. I similarly determined the percentage figures for the remainder of the period, 1.9 per cent in 1935, 1.8 per cent in 1936, 2 per cent in 1937, .9 per cent in 1938, 1 per cent in 1939 and .8 per cent in the first 9 months of 1940.

Q. I will ask you now to state the aggregate amount of the car hire or car service charges billed against the El Dorado Company during the first half of the year 1934 as well as the aggregate car mileage earned by the cars in the service of the El Dorado Company during this period.

A. Car service charges, $9,212.55; car mileage $16,553.30.

Q. Will you please present the corresponding figures for the second half of the year 1934.

A. Car service charges, $8,449.07; car mileage $15,936.05.

[fol. 487] Q. Will you present the corresponding figures for the period of 17 months covered by the suit, namely, from January 1934 to May 1935, both inclusive.

A. Car service charges $25,651.26; car milgage $56,411.59.

Q. And finally will you present the corresponding figures for the remainder of the contract period, namely, from June 1935 to December 1936, both inclusive?

A. Car service charges $26,249.01; car mileage $59,720.71.

Mr. Matthew: That is all. The witness is yours.

Cross-examination.

By Mr. Williamson:

Q. Mr. Kious—have I got the name right?

A. Yes.

Q. Mr. Kious, you have used the term throughout your testimony "service charges" and you stated that you got that from the books of the General American Tank Car Corporation or Transportation Company now. That is where you got it?

A. Well, that is the term——

Q. That is where you got it, from your books?

A. Yes.

Q. All right. Now, will you state what that service charge item includes in your books?

A. Charges on tank cars.

Q. Well, have you included in there the car rental that is payable to your company for lease or rental of the car?

[fol. 488] A. Yes sir.

Q. That is a part of the service charge. Now, what else is included in your item of service charge?

A. There is nothing else.

Q. Have you included in there any car repairs?

A. No sir.

Q. No interest on the investment or anything of that kind?

A. No sir.

Q. So I am correct in understanding, then, that your car service or your service charge, as you have testified to the figures this morning and yesterday, covers only the stipulated car rentals?

A. That is right.

Q. So that of necessity it couldn't include any charges for cleaning or anything of that kind that the lessee or user of the car may have had?

A. No.

Q. All right. Now, when you used the term—counsel has used it and you have been questioned about it—the term "excess mileage earnings" you do not mean that that is anything in excess of the mileage allowed or payable under the tariffs? You do not use it in that sense?

Mr. Matthew: Oh, no. I think it was made very clear. Are you asking me the question?

Mr. Williamson: I am asking you the question, yes.

[fol. 489] Mr. Matthew: Oh, no. I think I made it very clear that I am talking about the excess of the car mileage earnings over the car service charges or car rental.

Mr. Williamson: Then, to the witness:

By Mr. Williamson:

Q. The term that you have used "excess mileage earnings" is a term used to express the difference between the car rentals which you have spoken of as service charges and the mileage received, and that is all?

A. That is right.

Q. You supervised the making up of these exhibits, Nos. 9 and 10, I presume?

A. Yes, I did.

Q. Now, you made them up for the purposes of this hearing, I assume?

A. We did.

Q. Now, do you set forth or do you include in these statements the records of all cars of the General American Corporation that have been in service during the period referred to under lease or rental contracts?

A. Which line do you refer to, Mr. Williamson?

Q. Well, take Item 2 on Exhibit 10, average total number of cars owned by General American; now, does that Item 2 cover all of the tank cars owned by the General American which were in service under lease or rental contracts?

A. Well, that has no reference to the number of cars [fol. 490] under lease. That is just the total number of cars owned by the corporation.

Mr. Matthew: Tank cars?

The Witness: Tank cars.

By Mr. Williamson:

Q. Tank cars?

A. Yes sir.

Q. Well, do you show on this statement, Exhibit 10, the total number—the record of the operations of the total number of cars, tank cars, of the General American, which were operated under lease or contract of rental during that period?

A. That is in line 4.

Q. Now, that, for the last half of 1934, apparently was 10,720?

A. That is the average number of cars, yes.

Q. Well, you referred to Item 4 and I read Item No. 4.

A. That is right.

Q. Now, I asked you whether that was the total number, whether that included all of the cars of the General American which were under lease or contract during that period?

A. That is right.

Q. You made the distinction that it was average, but I wanted to know whether it covered them all and that is the distinction I make, and you say it does cover them all?

A. Yes sir.

[fol. 491] Q. And is that the same as to the successive columns of figures for 1935, '36, '37, '38, '39, and '40?

A. Yes.

Q. Just the same?

A. Yes.

Q. So that that would indicate that during the year 1940, or the period of 8 months covered in this statement, you had 24,894 tank cars out under lease or contract, whereas, in the year 1934 you had 10,000, is that correct?

A. That is correct.

Q. Now, in the 5th block of figures on this Exhibit 10 you show what purports to be the percentage of cars earning mileage in excess of service charges, and again there is no misunderstanding between us, you refer there to the mileage earned as a total mileage paid under the tariffs and the service charge that the car rentals——

A. I don't quite get you, Mr. Williamson.

Q. I say where you use the term mileage earned, mileage in excess there, you refer to the car mileage?

A. Car mileage, yes.

Q. Yes, earned?

A. Earned by cars under lease.

Q. Yes, and by the service charge, you refer to the rental of the cars?

A. That is right.

[fol. 492] Q. And you compute your percentage on that basis?

A. That is right.

Q. And so far for the year 1934, the last half, I notice you have figured that 5 per cent of the cars of the General American Company earned in mileage more than the car rentals?

A. That is borne out by the figures.

Q. Well, I am asking you to explain your figures; that is what I understand your figures to mean.

Mr. Matthew: Pardon me. Are you referring to the last line?

Mr. Williamson: Yes.

A. Line 5, Exhibit 10.

Mr. Matthew: Well, may I have the question reread, please?

(The question referred to was read by the reporter.)

The Witness: Well, as is shown in the heading on line 5, that is a relation of line 1 to line 4.

By Mr. Williamson:

Q. Well, now, do I make myself clear to you? I am asking you whether this fifth block, as I call it, on Exhibit 10 in the column under 1934, your figures, that 5 per cent of the General American Tank Car Company's cars under lease or contract during the last half of the year 1934 earned more than the car rentals?

A. 5 per cent.

Q. Yes. Now, then, follow right along. Am I correct in [fol. 493] understanding that 4 per cent of such cars earned in excess in the year 1935?

A. Yes sir.

Q. And 5 per cent in 1936?

A. That is right.

Q. 7 per cent in 1937?

A. That is right.

Q. 5 per cent in 1938?

A. That is right.

Q. 4 per cent in 1939?

A. Yes sir.

Q. And 3 per cent in 1940 for the period—

A. The first 9 months.

Q. The first 8 months in 1940?

Mr. Matthew: The first 9 months; pardon me.

Mr. Williamson: Oh, yes, the first 9 months; it is 9/30.

A. Yes.

By Mr. Williamson:

Q. Then, referring again to Exhibit No. 10, block 3, under the year in the column headed 1934, your figures show, do

they not, that 2.3 per cent of the General American's cars only earned mileage in excess of the rental or service charge?

A. That is right.

[fol. 494] Q. And in 1935 1.7 per cent?

A. That is right.

Q. And in 1936, 2.6 per cent?

A. That is right.

Q. And in 1940, 2.3 per cent for the 9 months?

A. That is right.

Q. 1939, 2.5 per cent?

A. Yes.

Q. And in there again you have used the service charge as the rental, the car rental as a basis of your percentage in making your computations?

A. No; rental doesn't enter into that; that is percentage of cars.

Q. Yes, I know, but Mr. Kious, when you state percentage of cars earning mileage in excess of service charges to the total number of cars owned by General American——

A. The total number of cars, yes.

Q. Yes, my question was——

A. That is right.

Q. My question was the cars of the General American Company. You have got to have a basis for the term "service charge" and that is the rental again?

A. That is right.

Q. All right, and so your percentages here in this column, in block No. 3 were computed again on the basis of rentals, [fol. 495] car rentals for service charges?

A. Well, I don't think we understand each other. That isn't the way—the way your question is put is not the way I understand the statement to be. You are speaking about charges; I am speaking about cars.

Exam. Sharp: I think he merely wants to get back to what he defined a while ago, that car service charges equal car rental charges; the terms are synonymous.

The Witness: That is one and the same.

Exam. Sharp: That is all you mean?

Mr. Williamson: I wanted to show when he used the term "service charge" he used it just as he did before.

The Witness: Yes, that is all we are speaking about any time when we speak of service; there is nothing else included.

Mr. Williamson: All right, we have got that clear. I think that is all of the witness.

Mr. Matthew: Just a moment, please, Mr. Kious.

Re-direct examination.

By Mr. Matthew:

Q. You were asked about car repairs. Did the General American Company bill the El Dorado Company for the cost of any car repairs during the period covered by this exhibit?

A. No.

Q. You were asked in relation to this same exhibit No. [fol. 496] 10 whether the number of cars shown in Item 4 represented the cars, represented all of the cars in the service of shippers under car service contracts, and what was your answer?

A. They are.

Q. Now, how did you determine the number of cars in the service of shippers under car service contracts?

A. Upon an examination of the records.

Q. All right. Now, did you include all of the cars in all contracts with shippers?

A. No.

Q. What cars did you include?

A. Only cars under contracts which provided for the crediting of mileage.

Q. Then, in answer to Mr. Williamson's question you meant to refer, then, to the cars which were in use under contracts which provided for the crediting of mileage to the shippers either in full or up to the amount of the car rental?

A. That is right. If the answer I gave—if I gave any other impression, why, it was wrong, because that is the basis on which the statement was prepared.

Mr. Matthew: That is all. Thank you.

Exam. Sharp: Just one more point to clear up. The caption in Item 4 says "Average total number of cars in service," whereas the statements you have made have seemed to indicate that those were, well, you said "all the [fol. 497] cars," but that is an average of all the cars as you stated here, is it not?

The Witness: That is right.

Exam. Sharp: Some months during that six months' period there might have been more and some months less?

The Witness: That is right; this is the average.

Exam. Sharp: That is what you mean?

The Witness: Exactly.

Exam. Sharp: That is all I have.

Mr. Matthew: We have nothing further to offer for General American.

(Witness excused.)

Exam. Sharp: There is one question I would like to have answered. I can't ask Mr. Kious the question but somebody ought to answer the question and reply to what has been said, and that is when a shipper cleans a car after it has been cleaned by the carrier at the shipper's request, is the shipper accorded any allowance by the carrier for the work he does?

Mr. Williamson: No. Well, when counsel concluded I was going to put Mr. Gilmore on the stand again and may be can develop any of those questions you would like to develop.

Exam. Sharp: Well, Mr. Gilmore is a chemist. I don't suppose he knows about that.

Mr. Williamson: Well, he has charge of the car cleaning [fol. 498] at our place, at the El Dorado; he knows.

Exam. Sharp: Well, of course, I am not thinking about your shipments because I have had that explained, but from the average treatment accorded other shipments. The point is in the ordinary course of events has the oil company the right to expect the offset charges that it incurs if it pleases to clean the cars exceptionally well against any contract charges which it may have with the General American Car Company?

Mr. Williamson: Well, I think we can answer that by stipulation, that under the agreement of car rental we will say the El Dorado Oil Works in the case of its contract, and other renters of cars in the case of their respective contracts would not have a stipulated right to charge the cost of cleaning the cars against the General American Tank Car Corporation. The contract provides for no such thing.

Exam. Sharp: Nor against the railroads?

Mr. Williamson: Well, that isn't covered in the contract. It isn't referred to in the agreement at all.

Exam. Sharp: Not by the contract?

Mr. Williamson: No.

Exam. Sharp: But what is the general practice?

Mr. Williamson: The shipper does not bill the railroads for the cost of cleaning the cars in present day practice at all.

[fol. 499] Exam. Sharp: I see. That is sufficient.

Mr. Fort: It is our position, of course, that——

Mr. Williamson: There is——

Mr. Fort: Do you have something further to say?

Mr. Williamson: Excuse me just a moment, Mr. Fort. I was going to say to the Examiner, of course the shipper, the El Dorado Oil Works in this instance, cleans the cars in order to maintain the quality and color of its oil during the shipment and to the point of arrival. If the cars are contaminated to the point where the oil is deteriorated in transit the railroads would be liable to claims.

Now, to the extent that the shipper and the railroads cooperate in the cleaning of the cars they necessarily cooperate to protect all parties, the shipper in the quality of its oil and the carrier in the safety of its transportation, but, as I understand it, they have no agreement, no agreement at all about paying a shipper for the cleaning of the cars.

I think that answers the question you asked.

Exam. Sharp: That answers it from your standpoint, but again a shipper has not the right to demand a superior facility from a carrier in order to accomplish its particular purposes?

Mr. Williamson: Well, are you announcing that or asking me?

Exam. Sharp: I am asking you; I am not only asking [fol. 500] you, but I think that is a matter of law.

Mr. Williamson: Well, of course, whatever the Examiner announces, his opinion I have no argument with.

Exam. Sharp: I don't make the law, but I would like to have this record as clear on the point as possible, but never mind.

Mr. Fort: Mr. Examiner, I think the point you raise is one for argument and will be argued in due course. Our position is that this preparation which was given these cars in some cases was in no sense a transportation service

falling within the rate, and that whatever obligation the railroad had with respect to a car was fully met.

Now, when it gave the type of cleaning covered by our testimony upon request and this further treatment involving the use of large quantities of oil, it obviously was not any service performed by the shipper for the railroad company, and no service which the railroad company was either obliged to perform or to pay for directly or indirectly. We will make that very clear in our argument.

Mr. Williamson: I am not arguing the question at all.

Mr. Fort: I didn't mean to either.

Exam. Sharp: That was just his statement of his position, Mr. Williamson: It isn't necessary to argue it right now. [fol. 501] Mr. Fort: I thought the Examiner called for a statement of my position, and I didn't mean to argue.

Mr. Williamson: Yes.

Now, may I call Mr. Gilmore?

Exam. Sharp. Yes.

You have been sworn?

Mr. Gilmore: Yes.

H. V. Gilmore resumed the stand and testified further as follows:

Mr. Williamson: While Mr. Gilmore is on the stand again I would like, Mr. Examiner, to offer in evidence, which I had intended doing yesterday, the several exhibits of types and samples of oil which are numbered, I believe, in the record Exhibits 1 to 8 inclusive. They have been put in transportable form now and are available for use in whatever way the Examiner and the Commission desire to put them to.

Exam. Sharp: Exhibits 1 to 8 inclusive will be received.

(Exhibit 1 to 8 inclusive, Witness Gilmore, received in evidence.)

Direct examination.

By Mr. Williamson:

Q. Now, Mr. Gilmore, you heard the testimony of the [fol.502] employees of the railroad company with regard to the cleaning of tank cars by the injection of a mixture of caustic soda and water, and that was the cleaning was it,

that you referred to yesterday that the cars sometimes received from the railroads?

A. Yes.

Q. Will you state whether cars cleaned in that manner and by that method, and to the extent that the gentlemen testified yesterday would make those cars suitable for the transportation of your Snowflake coconut oil?

A. They would be suitable if we received them at once, but under the conditions that we receive them they are entirely unsuitable due to the formation of rust.

Q. Well, you said yesterday that the caustic had the effect of producing a rust in the car, and that if the car came to you, or stood at all over 24 hours it would develop an inside rust, is that correct?

A. Yes, that is true.

Q. And that is why you say that it will not be suitable?

A. Yes sir.

Q. And have you found from your experience that the further cleaning to which you put the cars, and which you described yesterday was essential to preserve and transport your Snowflake oil?

A. It is essential, yes.

[fol. 503] Q. And the items, of course, incurred in that behalf, and which you described were actual expenditures?

A. Yes.

Q. Except as to overhead, office overhead?

A. Yes.

Q. Now, something was stated yesterday, some of the witnesses stated that the El Dorado Oil Works on occasion requested the railroads to clean tank cars. In your experience there from 1932 on what light can you give the Examiner on the matter of requests for cleaning of cars by the El Dorado Oil Works to the railroads?

A. These cars, as I recalled, were received in a very rusty condition and we haven't the facilities to remove rust from the cars, that takes a strong caustic wash, and where the rust has been there for some time and it is removed by the railroad and then brought back, then, we can remove it with coconut oil. It sounds a little peculiar, but the fresh rust is different from an old rust; it has a different compound in it; it is known as iron hydroxide instead of iron oxide, and it is much more easily removed by an oil wash. As a consequence, when we receive a car that has been cleaned by the railroad we usually wash it with oil

and then let it stand until the oil has reacted with the rust that is in the car, and then we wash that oil out and the car comes out reasonably clean. But in these cases that I [fol. 504] recall the cars have been very thoroughly cleaned by the person to whom we shipped the oil and left with water inside, and they had rusted considerably in transit back to our plant.

Q. Something was stated yesterday by the railroad employees that no complaint was made by the El Dorado Oil Works as to cars after cars had been cleaned by the railroads. Now, what experience have you had in that connection?

A. We have complained on a number of occasions and returned the cars to them for a second cleaning, but we found by experience that the cars always returned in approximately the same condition unless they were wiped down with coconut oil.

Q. Well, is it a fact and do you desire the Examiner to understand that where the cars have come from the railroad cleaning or are delivered without cleaning in such condition that you by your own cleaning process can put them in shape for transit; you make no objection?

A. No, we make no objection.

Q. You accept them?

A. We accept them.

Q. And if cars were delivered after cleaning by the railroad, delivered to you, and you made no objection, it would indicate that the cars were in such shape that with your treatment you could put them into use for the transportation of your oil?

[fol. 505] A. Yes.

Mr. Williamson: That is all.

Cross-examination.

By Mr. Fort:

Q. Mr. Gilmore, do you have tracks at your plant?

A. Yes, we have spur tracks.

Q. Do you keep cars there ready for loading?

A. Yes, the cars that are held in reserve that we wouldn't load for some time are usually held by the railroad, and

those that we are to load on that day or the following day are spotted on our tracks.

Mr. Fort: I think that is all I have.

Mr. Williamson: That is all.

Exam. Sharp: That is all.

(Witness excused.)

Exam. Sharp: Are there any other witnesses? (No response.)

How long would you like to have for briefs?

Mr. Williamson: Well, are you gentlemen going to take the opening? You are attacking our right to receive this. I don't know who has the opening.

Exam. Sharp: I should say you did, Mr. Williamson.

Mr. Williamson: We have the opening?

Exam. Sharp: I think so.

Mr. Williamson: All right.

[fol. 506] Mr. Fort: Well, under the practice the briefs are filed at the same time.

Mr. Williamson: Simultaneously, I think.

Mr. Fort: Are they not?

Mr. Matthew: I assume, Mr. Examiner, this is a proposed report case.

Exam. Sharp: I think so.

Mr. Matthew: I didn't bring my rules with me. I had the impression there would be concurrent briefs in such instance.

Exam. Sharp: Maybe. Well, I haven't mine with me either. I believe that is right.

Mr. Matthew: I have a copy of the rules here.

Mr. Williamson: We don't care one way or the other about the opening or the closing. We will contribute our bit to the discussion sometime or another in the course of the proceedings, but I had hoped, or would like to have had the scope of the case more or less defined so as to limit our discussion, keep it within those bounds, but I am perfectly willing to file the opening brief if they are to be filed in sequence; as I understand it, they are to be filed all at the same time.

Exam. Sharp: Just a minute.

Mr. Matthew: If the Examiner please, the rules dealing with procedure in proposed report cases apparently pro-

[fol. 507] vide on page 44 that only one initial brief should be filed by each party, the presiding commissioner or Examiner shall fix for all parties the same time within which to file briefs. Reply briefs are not permitted at this stage.

That, I think, is the applicable rule.

Exam. Sharp: That is sufficient. Thank you.

Still, I would like to know how much time you want, in view of the holidays coming in. I will be a little liberal at this time of the year.

Mr. Williamson: Well, I should like 30 days.

Mr. Matthew: If your Honor please, I was going to suggest 60 days because we want to wait until we have the transcript.

Exam. Sharp: That is a long while unless there is some special circumstance.

Mr. Williamson: I thought that was about customary.

Exam. Sharp: I think 30 days is about the usual time.

Mr. Fort: The transcript will probably not be available to us until the holiday season, so 60 days would not be much more than the ordinary 30 days without the intervention of the holidays and the additional time required by reason of the location of this particular hearing, or the place of the hearing. I would like to have 60 days, if possible.

Exam. Sharp: Off the record.

(Discussion off the record.)

[fol. 508] Exam. Sharp: On the record.

Briefs will be due, then, February 10, 1941, and Mr. Williamson will have the free copy of the transcript for the shippers and you, Mr. Fort, for—no, I believe the suit is against the General American, so Mr. Matthew will be entitled to a free copy for the other side.

Mr. Fort: Well, in this particular case where the General American is the intervener you have one aspect on one hand and another aspect on another. As a matter of a free copy I would like very much to get it.

Exam. Sharp: I beg your pardon. I got it mixed up myself because the General American is the intervener; I was wrong. The truth is, I suppose, that there ought not to be any free copies at all.

Mr. Fort: Oh, now, Mr. Examiner——

Exam. Sharp: Well, usually in these investigations by the Commission no free copies are given, but the Commission itself in a letter to you dated October 17, 1940 appeared to treat the case somewhat as a complaint case and for that reason I suppose they will follow the rule in complaint cases, and I don't see any objection to the two free copies, one of which would go to Mr. Fort instead of Mr. Matthew.

If there is nothing further this hearing is closed.

(At 10:30 o'clock a. m., December 10, 1940, hearing closed.)

(Here follows 1 paster, side folio 509)

[fol. 509]

EXHIBIT No. 9

Witness-Kious

Sheet 1 of 2 sheets

Interstate Commerce Commission—Docket No. 28515—Allowances for Privately Owned Tank Cars

General American Transportation Corporation

Comparison of Mileage Earnings and Service Charges on General American Tank Cars in Service of El Dorado January 1, 1926 to September 30, 1940

	1926	1927	1928	1929	1930	1931	1932	1933	1934	1935	1936
1. Total mileage earned by cars in El Dorado service	$42,535.39	$45,022.44	$55,078.12	$45,434.02	$50,727.85	$42,209.47	$34,259.27	$58,536.15	$32,489.35	$52,065.28	$31,577.67
2. Average number of cars in El Dorado service per month	65	68	68	85	73	70	70	70	55	56½	50
3. Average mileage earnings per car per month	$54.18	$55.17	$67.50	$44.41	$57.77	$50.25	$40.78	$69.69	$49.60	$76.79	$52.63
4. Total service charges payable by El Dorado	$23,636.00	$24,480.00	$24,480.00	$30,945.42	$27,553.58	$27,125.56	$26,972.17	$26,925.04	$17,711.62	$17,827.55	$16,360.10
5. Average service charges per car per month	$30.11	$30.00	$30.00	$30.25	$31.38	$32.29	$32.11	$32.05	$27.64	$26.29	$27.27
6. Excess of total mileage earned over total service charges	$18,899.39	$20,542.44	$30,598.12	$14,488.60	$23,174.27	$15,083.91	$7,287.10	$31,611.11	$14,777.73	$37.73	$15,216.57
7. Excess of average mileage earnings over average service charges per car per month	$24.07	$25.17	$37.50	$14.16	$26.39	$17.96	$8.67	$37.64	$22.56	$50.50	$25.36

[fol. 509]

EXHIBIT No. 9

Witness Kious

Sheet 1 of 2 sheets

Interstate Commerce Commission—Docket No. 28515—Allowances for Privately Owned Tank Cars

General American Transportation Corporation

Comparison of Mileage Earnings and Service Charges on General American Tank Cars in Service of El Dorado
January 1, 1926 to September 30, 1940

1926	1927	1928	1929	1930	1931	1932	1933	1934	1935	1936	1937	1938	1939	1940 (1/1 to 9/30)
$42,535.39	$45,022.44	$55,078.42	$45,434.02	$50,727.85	$42,209.47	$34,259.27	$58,536.15	$32,489.35	$52,065.28	$31,577.67	$33,535.03	$34,696.12	$32,872.01	$21,203.26
65	68	68	85	73	70	70	70	55	56½	50	50	50	50	52½
$54.18	$55.17	$67.50	$44.41	$57.77	$50.25	$40.78	$69.69	$49.60	$76.79	$52.63	$55.89	$57.83	$54.79	$51.28
$23,636.00	$24,480.00	$24,480.00	$30,945.42	$27,553.58	$27,125.56	$26,972.17	$26,925.04	$17,711.62	$17,827.55	$16,361.10	$16,351.66	$16,430.64	$16,354.72	$12,956.65
$30.11	$30.00	$30.00	$30.25	$31.38	$32.29	$32.11	$32.05	$27.04	$26.29	$27.27	$27.25	$27.38	$27.26	$27.45
$18,899.39	$20,542.44	$30,598.12	$14,488.60	$23,174.27	$15,083.91	$7,287.10	$31,611.11	$14,777.73	37.73	$15,216.57	$17,183.37	$18,265.48	$16,517.29	$11,246.61
$24.07	$25.17	$37.50	$14.16	$26.39	$17.96	$8.67	$37.64	$22.56	$50.50	$25.36	$28.64	$30.15	$27.53	$23.83

[fol. 510]

Sheet 2 of 2 sheets

Interstate Commerce Commission—Docket No. 28515—Allowances for Privately Owned Tank Cars

General American Transportation Corporation

Comparison of Mileage Earnings and Service Charges on General American Tank Cars in Service of El Dorado

	Summary for 3-year period 1934–1936 incl.	Recapitulation entire period Jan. 1, 1926 to Sept. 30, 1940
1. Total mileage earned by cars in El Dorado service	$116,132.30	$615,241.43
2. Average number of cars in El Dorado service per month	54	62
3. Average mileage earnings per car per month	$59.74	$56.06
4. Total service charges payable by El Dorado	$51,900.27	$326,111.71
5. Average service charges per car per month	$26.70	$29.72
6. Excess of total mileage earned over total service charges	$64,232.03	$289,129.72
7. Excess of average mileage earnings over average service charges per car per month	$33.04	$26.34

[fol. 511-645]

EXHIBIT No. 10

Interstate Commerce Commission—Docket No. 28515—Allowances for Privately Owned Tank Cars

General American Transportation Corporation

Total Number of Tank Cars Earning Mileage in Excess of Service Charges Compared with (a) Total Number of Tank Cars Owned by General American and (b) Total Number of Tank Cars in Service of Shippers Under Contract Providing for Crediting Mileage to Car Service Account.

July 1, 1934 to September 30, 1940

	1934 (7/1 to 12/31)	1935	1936	1937	1938	1939	1940 (1/1 to 9/30)
1. Average total number of cars, earning mileage in excess of service charges, in service of shippers under contracts providing for crediting mileage to car service account	554	587	985	1,556	1,063	928	852
2. Average total number of cars owned by General American	24,514	34,708	37,961	36,361	36,608	36,897	36,925
3. Percentage of cars earning mileage in excess of service charges to total number of cars owned by General American (item 1 to item 2)	2.3%	1.7%	2.6%	4.3%	2.9%	2.5%	2.3%
4. Average total number of cars in service of shippers under such contracts	10,720	14,244	19,167	22,545	21,494	22,705	24,894
5. Percentage of cars earning mileage in excess of service charges to total number of cars in service of shippers under such contracts (item 1 to item 4)	5%	4%	5%	7%	5%	4%	3%

[fol. 646] BEFORE INTERSTATE COMMERCE COMMISSION

No. 28515

Allowances for Privately Owned Tank Cars

Submitted November 5, 1941. Decided April 10, 1944

Upon investigation to determine the lawfulness under the Interstate Commerce Act and Elkins Act of practices disclosed in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, found:

1. That the rental paid by El Dorado Oil Works to General American Tank Car Corporation under lease agreement was the only cost incurred by the former in furnishing the tank cars in which its shipments moved; that a just and reasonable allowance by the rail carriers to the Oil Works for furnishing such cars would have been an amount not to exceed such rental; and that such an allowance has been paid.

2. That payment of an allowance to the Oil Works by the rail carriers or the Tank Car Corporation in excess of such rental would be unjust, unreasonable, and unduly preferential; and that payments by the Tank Car Corporation to the Oil Works prior to July 1, 1934, under the lease agreement, in excess of the rentals due were unjust, unreasonable, and unduly preferential.

3. That the Oil Works was entitled to no allowance from the rail carriers, directly or through the Tank Car Corporation, for special cleaning and preparation of tank cars. Proceeding discontinued.

W. F. Williamson for El Dorado Oil Works and El Dorado Terminal Company.

J. Carter Fort, L. M. Bradshaw, R. E. Wedekind, Joseph S. Lafferty, R. S. Outlaw, Guernsey Orcutt, C. A. Miller, and *W. N. McGehee* for respondents.

Allan P. Matthew; Starr Thomas, F. W. Mielke, W. S. Hefferan, Jr., Kenneth F. Burgess, and *Douglas F. Smith* for General American Transportation Corporation.

By the Commission:

The El Dorado Oil Works, hereinafter called the Oil Works, and its wholly owned subsidiary, El Dorado Terminal Company, hereinafter called the Terminal Company, will be referred to as petitioners. The Oil Works is a California corporation, which, at the times hereinafter recited, was engaged in crushing copra and extracting coconut oil [fol. 647] therefrom in plants at Berkeley and Oakland, Calif., and shipping the product in tank cars in interstate commerce. The Terminal Company also is a California corporation, and during the times here involved it performed services for the Oil Works in the handling and shipping of its commodities. The General American Tank Car Corporation [1], hereinafter called the Tank Car Corporation, throughout the transactions hereinafter recited had its principal office at Chicago, Ill., and was the owner of numerous railways cars, including tank cars, which it furnished to various shippers for the transportation of their commodities. It was not affiliated with any railroad company by stock ownership or otherwise.

On September 28, 1933, the Oil Works entered into a written agreement, set forth in the appendix, with the Tank Car Corporation for the lease to the Oil Works during the period beginning January 1, 1934, and ending December 31, 1936, of 50 standard tank cars, referred to as permanent cars, at a rental of $27.50 per month, and for such further number of tank cars as the Oil Works should require at a rental of $30 per month, the Oil Works agreeing, insofar as it could lawfully do so, to use the Tank Car Corporation's cars exclusively. The agreement provided, among other things, that the Tank Car Corporation should collect from rail carriers all mileage earned by the leased cars while in the service of the Oil Works and each month should credit the entire earnings to the rental account of the Oil Works. Pursuant to this agreement the Tank Car Corporation assembled and furnished to railroad common carriers nu-

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[1] General American Transportation Corporation, a New York corporation, has become the successor in interest and acquired all assets and assumed all liabilities of the Tank Car Corporation.

merous tank cars, as directed by the Oil Works, and such cars were used by the railroads for the interstate transportation of the products of the Oil Works to various eastern destinations. The Tank Car Corporation as the owner of the cars involved collected from the railroads rental for the use of the cars, based on an allowance per mile for the distance for which they were used according to the tariffs filed with us by the railroads as required by law, but such tariffs did not provide for the payment of an allowance to the owner of the property transported from the plant of the Oil Works by reason of the furnishing of the tank cars therefor by the Oil Works as shipper-owner.

During the period from January 1 to July 1, 1934, the Tank Car Corporation paid over to the Oil Works mileage earnings of $7,219.54 in excess of the rental due from the Oil Works. After the latter date, assuming that such action would be necessary to comply with the principles enunciated by us in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323, decided July 2, 1934, hereinafter called the *Refrigerator Car case*, the Tank Car Corporation refused to pay over to the Oil Works any further excess mileage earnings, notwithstanding the terms of the lease agreement.

In June 1935, the Terminal Company, as assignee of its parent company, the Oil Works, sued the Tank Car Corporation in the United States District — for the Northern District of California to recover unpaid excess mileage earnings which had accrued from the use of the leased cars up to May 31, 1935. The amount sued for is shown in the [fol. 648] petition hereinafter mentioned as being $18,532.78, but according to evidence of record the difference between the rentals credited by the Tank Car Corporation to the Oil Works and the total amount of mileage earnings of the leased cars received by the Tank Car Corporation from the carriers, during the period from January 1, 1934, to May 31, 1935, appears to have been $23,540.79. Judgment for the Tank Car Corporation was rendered by the District Court, but was reversed on appeal by the Circuit Court of Appeals, 104 Fed. 2d, 903, 916, which held the Oil Company was entitled to the full amount claimed. The Supreme Court granted certiorari. Subsequently, in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, the Supreme Court held that the "reasonableness and legality of the practices of the parties was subjected by the Interstate Commerce Act to the adminis-

trative authority of the Interstate Commerce Commission," and that "when it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act." The judgment of the Circuit Court of Appeals was reversed and the cause remanded to the District Court to be there held "pending the conclusion of an appropriate administrative proceeding" by the Commission. There is also pending in the District Court a second suit by the Oil Works for the recovery of unpaid excess mileage earnings which accrued between May 31, 1935, and the expiration of the contract, December 31, 1936.

Following the decision of the Supreme Court, the Oil Works and the terminal company on June 7, 1940, jointly petitioned us to cause an investigation to be made of the practices disclosed by the action referred to and in the opinion of the United States Supreme Court. The prayer of the petition is set out in the margin.[2] Upon consideration

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[2] "Wherefore, petitioners pray that the Commission cause an investigation to be made of the practices disclosed by the said action, and in the said opinion of the United States Supreme Court, and after such investigation and such hearing as the Commission may desire, the Commission enter its order holding that payment by the General American Tank Car Corporation to petitioners of the amounts so collected by said tank car corporation as mileage allowances for the use of the tank cars leased by petitioners and furnished by them to the railroad carriers may be made as provided in and for the entire period covered by the agreement of the parties dated September 28, 1933, without the violation of any provisions of the Elkins Act, and that the payments so made are reasonable and will not accomplish a rebate, concession or an advantage or discrimination in favor of either of the petitioners or in violation of the provisions of the Elkins Act, and that such other and further order or orders be made as the Commission may consider proper in the premises."

of that petition, by our order dated July 24, 1940, we instituted an investigation upon our own motion to determine:

(1) whether the practices involved under the terms and operation of the lease contract are unlawful in violation of the Interstate Commerce Act;

[fol. 649] (2) whether a reasonable charge or allowance may be paid, and, if so, the amount thereof as a maximum to be paid, by the carrier or carriers by railroad for the use of the tank cars furnished such carriers by petitioners for the transportation of the products of petitioners in interstate commerce from Berkeley and Oakland, Calif., in the period January 1, 1934, to December 31, 1936; and

(3) what findings shall be made, or what rules, regulations, or practices shall be prescribed, or what orders shall be entered, to remove any unlawfulness that may be found to exist.

All common carriers by railroad concurring in Trans-Continental Freight Bureau tariff No. 3-N, I. C. C. 1452 (Agent Kipp issue), naming rates on coconut oil and other commodities from California to eastern points, were made respondents.

A hearing has been held at which petitioners, the Tank Car Corporation, and respondents participated. The parties filed briefs, a proposed report was served to which exceptions and replies were filed, and we heard oral argument. Our conclusions are in substantial accord with those reached by the examiner. The material facts established by the record are not in dispute. While the petition which led to this investigation raised the question whether the payments involved violations of the Elkins Act, and our order of investigation does not specifically mention that act, all the parties have argued fully the questions arising under the Elkins Act. We will therefore treat the issue as embracing any questions arising under the Elkins Act, as well as under the Interstate Commerce Act, to which the Elkins Act is supplementary.

At the time the lease contract was executed the tariffs of the respondent railways contained a general provision for the payment by them of 1.5 cents per car per mile (both loaded and empty) for their use of tank cars of private

ownership. The tariffs also provided that this mileage compensation would be paid only to the car owner or to the party who had acquired the cars, as shown by the permanent reporting marks assigned by the transportation division of the American Railway Association.[3]

Effective April 1, 1935, the wording of the tariff of the American Railway Association (subsequently named Association of American Railroads) published on behalf of practically all Class I railroads in the United States, was amended to read as follows, and as so amended is still in force:

> Mileage for the use of cars of private ownership will be paid for loaded and empty movements only to the car owner—not to a lessee—provided cars are properly equipped and marked with the assigned reporting marks and car number * * *.

The lease agreement of September 28, 1933, renewed arrangements whereby the Oil Works had used tank cars of the Tank Car Corporation since 1918. Originally the arrangement provided for crediting the rental account of the Oil Works with mileage earnings paid by the railways to [fol. 650] the Tank Car Corporation, up to the amount of the rental contract, but no more. In 1925 the parties entered into a contract which provided that the Tank Car Corporation should credit to the rental account of the Oil Works all mileage payments received by the Corporation for its privately owned tank cars, used by the Oil Works. Beginning with the year 1926 this arrangement was carried out until July 1, 1934, when, as above stated, the Tank Car Corporation ceased to pay over to the Oil Works any mileage received by it in excess of the amount paid it by the Oil Works as rental. During the years 1926 to 1933, inclusive, the mileage payments exceeded the car rental by $161,684.94, all of which was paid by the Tank Car Corporation to the Oil Works. The mileage rental for the use of the cars was all collected by the Tank Car Corporation from the railways, as hereinbefore indicated.

Until the Oil Works and the Terminal Company jointly petitioned us to cause an investigation to be made and for an order based thereon, June 7, 1940, the jurisdiction of

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[3] American Railway Association tariff I. C. C. 2692.

this Commission had not been invoked to determine the legality of allowances paid to those petitioners, and no determination thereof had been made either under section 15 (13) of the Interstate Commerce Act or any other provision of law.

The petitioners show no item of cost in furnishing the tank cars to the carriers, for which the latter were liable under their obligations as common carriers, other than the rental. They say that they bore or assumed an average expense of $27.66 for special cleaning and preparation of the cars used. It appears that the railroads, upon request, cleaned in the usual manner all the tank cars furnished. Petitioners do not assert that the Tank Car Corporation or the railroad carriers were obligated to perform the special cleaning services, and, at most, they claim that they incurred an expense which should be given consideration in determining their costs. Such special cleaning and preparation as was given the tank cars furnished was not a common carrier obligation of the railway carriers, and consequently the owner of the goods shipped may not be paid an allowance therefor or recompensed by the railroad carriers. The Oil Works undoubtedly would have had to stand the same expense whether it owned the cars, or even if they were furnished by the carriers. *Suitable Cars for Loading Flour*, 128 I. C. C. 442, 444, and cases there cited.

The record indicates that there is a substantial difference in the situation respecting the furnishing of cars to the railways by private car companies and shipper-owners, and by shipper-lessees who obtain the cars from private car companies. With respect to the latter class, the principal cost is the rental paid by the shipper-lessees to the car owners, which varies with supply, demand, and competition. Private car companies and shipper-owners in furnishing cars to the railways, must consider investment, depreciation, maintenance, and certain related items of expense connected with ownership of the cars.

The foregoing are the essential facts disclosed by the record. They will be considered in determining the issues in this proceeding, namely, whether payment to the petitioners of the amounts collected by the Tank Car Corporation for the entire period covered by the agreement of September 28, 1933, may be made without violating the Elkins Act, and whether the practices involved are lawful [fol. 651] and reasonable in the light of the provisions of

the Interstate Commerce Act.[3] The pertinent provisions of both acts are cited in the opinion of the Supreme Court in *General American Tank Car Corp. v. El Dorado Terminal Co., supra*, and we advert to them without deeming it necessary to quote them *in extenso*.[4] In addition, attention should be directed to section 2 of the Interstate Commerce Act, which defines and prohibits unjust discrimination in respect of transportation charges.

The intent of the law as laid down in the statutes cited is clear that it is our duty to "cut up by the roots" all forms of rebates, concessions, and discriminations, whereby transportation charges are, directly or indirectly, made less than the published tariff rates or an advantage is given, whenever and wherever facts disclose such practices. In *O'Keefe, Receiver, etc., v. United States et al.*, 240 U. S. 294, 297, which involved the allowances or divisions that a trunk line might lawfully pay a connecting tap line railway, the Supreme Court said:

> That body (the Commission) has the authority and it is its duty to reach all unlawful discriminatory practices resulting in favoritism and unfair advantages to particular shippers or carriers. It is not only within its power, but the law makes it the duty of the Commission to make orders which shall nullify such practices resulting in rebates or preferences, whatever form they take and in whatsoever guise they may appear.

Unlawful rebates, concessions from the published and filed tariffs, and discriminations may be brought about by

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[4] Elkins Act, approved Feb. 19, 1903, as amended. Interstate Commerce Act, as amended, sec. 1 (3), freight cars facilities of transportation, as defined by the act; sec. 1 (10), (11), carriers' obligation to furnish cars upon reasonable request; sec. 6 (1), filing of tariff schedules required, to include all privileges; etc., in any wise changing, affecting, or determining any part or the aggregate of the rates and charges; sec. 6 (7), carriers not to engage in transportation unless schedules filed and published, and published rates to be strictly observed; sec. 15 (13), charge and allowance to owner of property transported to be published in tariffs or schedules filed, to be no more than is just and reasonable; determination by the Commission of reasonable charge as the maximum to be paid by the carrier.

the act of a person who is not directly in the relation of carrier and shipper, as well as by payments by the carrier to the shipper directly. This is illustrated in *Union Pac. R. Co.* v. *United States*, 313 U. S. 450, and *Spencer Kellogg & Sons* v. *United States*, 20 Fed. (2d) 459. The fact that purchasers of the Oil Company's products may have been the consignees and have paid the full tariff transportation charges to the delivering railways, does not make it impossible that the Oil Company, as consignor, may have been a party to an unlawful concession from the published rate if paid an undue amount for the service it actually performed. Compare *Elgin, J. & E. Ry. Co.* v. *United States*, 253 Fed. 907, 911.

[fol. 652] We have previously referred to the tariff provisions applicable during the whole period under consideration. For the period from the making of the lease contract until April 1, 1935, the carriers' tariff rule provided that the mileage would be paid only to the car owner or to the party who had acquired the cars, as shown by the permanent reporting marks assigned by the transportation division of the Association of American Railroads. From and after April 1, 1935, payments were to be made "only to the car owner—not to a lessee—provided cars are * * * marked with the assigned report marks * * *." The effect of these rules was that during the entire period under consideration they "precluded payment of the mileage allowance to the Oil Works under the circumstances of this case, since the lease stipulated that all leased cars should bear the reporting marks" of the Tank Car Corporation (*General American Tank Car Corp.* v. *El Dorado Terminal Co.*, *supra*, at page 426). As the tariffs carried no provision whereby any allowance whatsoever could be paid to either the Oil Works or the Terminal Company, it was the duty of the railroad carriers to observe strictly the tariffs until changed according to law. The railroad carriers were required to abstain from passing on to the shipper (the Oil Works) or any other person any rebate, concession, or discrimination in respect of the transportation of property in interstate commerce whereby the property should be transported at a less rate than named in the tariffs published and filed, or any other discrimination was given or practiced. The payment by the Tank Car Corporation to the Oil Works of moneys received from the rail carriers in respect of the transportation of the Oil Works' goods, over

and above the amount of money paid by the Oil Works to the Tank Car Corporation as rental for the cars furnished and used would, in our opinion, constitute a rebate and discrimination and involve a departure from the tariff rules applicable, prohibited by section 1 of the Elkins Act, and section 6 (7) of the Interstate Commerce Act, and we so find.

If justly and reasonably more than mere reimbursement for the rental paid should have been permitted to flow to the Oil Works as an allowance for transportation facilities (tank cars owned by the Tank Car Corporation) furnished to the railroad carriers which could not supply the tank cars upon reasonable request, the way such allowances can be made with full approval of the law is found in section 15 (13) of the Interstate Commerce Act, which is set out in [fol. 653] the margin hereof [5] as it read at the time the transportation involved occurred, and at the time this investigation was instituted.

There is some discussion in the record as to whether the Oil Works was the "owner of the property transported" in the tank cars which were furnished to and used by the railways, inasmuch as in some cases title to the contents of the tank cars may have passed to consignees, who are not involved in this dispute, and such consignees may have paid and borne the freight charges. This seems to be immaterial to the question of the propriety of an allowance to the consignor under section 15 (13) of the Interstate Commerce

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[5] If the owner of property transported under this act (changed to "part" on August 9, 1935) directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

[1] The paragraph has since been amended so as to require the allowance to be published in the filed tariffs. Act of Sept. 18, 1940.

Act, as far as the carriers are concerned, for they can not make inquiry as to the ownership of the goods. *Lehigh Valley R. Co. v. United States*, 243 U. S. 444. No complaint was ever made by the Oil Works under the paragraph cited, and we have never been called on to determine what is a reasonable charge as a maximum to be paid by the carriers for any services rendered or for the use of any facility furnished by the Oil Works in the circumstances as they exist in this case.

In administering the provisions of section 15 (13) we have consistently adhered to two principles, bearing in mind that we were to prescribe the *maximum* amount which the carrier might pay: (1) the amount paid should not be more than was just and reasonable for the service or instrumentality furnished, and (2) that the amount which might be paid should not exceed the reasonable cost to the owner of the goods of performing the service or furnishing the instrumentality used. Whichever of these sums was the lower marked the maximum the carrier might pay. The statute in terms forbids approval of an allowance of more than is just and reasonable, and payment of anything in excess of the shipper-owner's reasonable cost would have amounted to approval of a forbidden rebate, concession, and discrimination.

We have had occasion to give consideration to the essential question here presented in a number of proceedings, covering a long period of time. Thus, in *In the Matter of Private Cars*, 50 I. C. C. 652, we found that a reasonable allowance for the use of privately owned tank cars would be 1 cent a mile. The figure was based on the average cost of car ownership. In that proceeding the car owners conceded that they were not properly entitled to make a profit on their cars used by the carriers. They demanded, as a rule, that the entire cost to them, together with interest on their investment, should be covered by payment for their use. In *Paragon Refining Co.* v. *A. & S. R. R.*, 118 I. C. C. 166, we prescribed an allowance of 1.5 cents per car per mile for the future, in favor of the shipper, who owned the cars used.

In the *Refrigerator Car Case*, *supra*, we condemned the receipt by shipper-lessees of car-mileage allowances in excess of their actual costs, as reflected by their rental payments to the car-owning companies. In the case last cited we found the evidence insufficient to justify findings as to

whether the abuses found to exist as to refrigerator cars attended the use of tank cars. We did, however, find indication that such abuses existed in the adoption (under the National Industrial Recovery Act) of a code for the tank car service industry in which certain of the practices discussed, "such as permitting the lessee of cars to profit through the payment of mileage earnings" were "declared to be an unfair trade practice." (Pages 371-2.) We did feel warranted in the observation that

> [fol. 654] The discussion herein has been confined almost entirely to refrigerator cars and the findings will be so restricted, but the general principles enunciated *apply equally to all other types of private cars.* (Page 382.) (Emphasis supplied.)

> Specifically, we found, with respect to refrigerator cars, * * * that the payment in whole or in part to shippers, including meat packers, of mileage earnings by railroads either direct or through car owners in excess of the amount of rental said shippers pay for the use of the cars and other actual expenses in connection therewith results in such shippers receiving transportation of their products at lower rates than those paid by shippers generally who use cars furnished by the carriers and at less than the published rates; and that any allowance paid to the shipper-owner of private cars, including meat packers and their operating subsidiaries or agents, by the railroads as mileage earnings in excess of the ownership cost, including a fair return on the investment, are unreasonable, unjustly discriminatory, and unlawful rebates and concessions.
>
> We do not undertake to say that a carrier may not accept private cars if it so desires, but if such cars are accepted the carriers may not acquiesce in arrangements under which mileage earnings accruing to the car owner are paid in whole or in part by such car owner to the shipper lessee which results in the payment by such shipper of charges less than the published tariff rate.

The present record shows how under contracts such as the one between the Oil Works and the Tank Car Corporation the Oil Works, as shipper, would reap a profit on the

leased cars so substantial in amount, if paid over by the rail carriers out of the transportation charges through the Tank Car Corporation to the Oil Works, as to have the result of enabling the Oil Works thereby to obtain the transportation of the commodity it ships in interstate commerce at a lower cost than others who use cars assigned to them by the carriers, or who own their own cars. It shows that the abuses found to exist as to refrigerator cars would measurably exist under the terms of the contract, if such terms were observed. We therefore approve the principles applied in the *Refrigerator Car Case* as related to the situation here involved.

The record herein deals primarily with shipments made long ago, in a particular type of equipment used for special commodities, from one point of origin. It does not enable us to deal with "classes" of cars furnished either generally or as to tank cars, except as to those supplied by the Tank Car Corporation and the Oil Works as its lessee. Were we to attempt to determine the reasonableness of allowances for a "class" of tank cars such as these, we cannot tell how far reaching the investigation would have to be. Its result would be futile, because (1) there would be no way to compel restitution one way or the other, so as to conform to any figure we might determine, and because (2) since the amendment to the Interstate Commerce Act September 18, 1940, we have a jurisdiction as to the future with respect to matters such as are here considered, which is plenary and [fol. 655] should be exercised directly and not as ancillary to a controversy concerning only past rights of parties to a contract entered into under preexisting law.

We therefore conclude and find:

(1) That the rental paid or to be paid by El Dorado Oil Works to General American Tank Car Corporation under the terms of the lease agreement between those parties, dated September 28, 1933, was the only cost incurred by the former in furnishing the tank cars in which its shipments moved. A just and reasonable allowance as a maximum to have been paid by the respondents, rail carrier or carriers, to the Oil Works for the furnishing of such cars would have been an amount not to exceed such rental. Such an amount and allowance has been paid to the Oil Works through credits made to the account of the Oil Works by the Tank Car Corporation.

(2) That an allowance to the Oil Works by the respondents, rail carrier or carriers, or by the Tank Car Corporation, under the agreement, in excess of said rental would be unjust and unreasonable, and would unduly prefer the Oil Works as a shipper of its commodities transported by it in the tank cars herein involved. The amount paid by the Tank Car Corporation to the Oil Works prior to July 1, 1934, under the terms of the agreement, to the extent it was in excess of the rentals due thereunder, was unjust and unreasonable, and unduly preferred the Oil Works as a shipper of its commodities.

(3) That the Oil Works is entitled to no allowance from the respondents, rail carrier or carriers, directly or through the Tank Car Corporation, for the special cleaning and preparation of the tank cars during the period of the agreement, January 1, 1934, to December 31, 1936.

An order will be entered discontinuing this proceeding.

PATTERSON, Chairman, concurring:

I concur herein solely because the amount already received by the Oil Works is substantially equivalent to $1 per car per day, which I believe is a reasonable allowance for a carrier to pay for the use of ordinary tank cars, such as were used here, whether such cars are furnished it by the owner or the lessee of the cars.

It is not enough, however, to merely find that $1 is a reasonable allowance for this particular shipper. Steps should be taken to prohibit the railroads from continuing to pay 1.25 cents per car per mile, loaded and empty, to other shippers who own their cars and to car companies, and to require them to make allowances on a per diem basis in paying each other for the use of cars. There is no sound reason why a carrier should pay a per diem rate for the car of another carrier and a mileage rate for a privately owned car. This dual system of payments breeds discrimination and in many cases, such as this, results in unwarranted returns to the private owner.

These tank cars are as necessary to the commerce of the country as box, coal or any other type of car that the railroads hold themselves out to furnish shippers. The time has come when the railroads should furnish such cars to the shippers.

[fol. 656] SPEAWN, Commissioner, dissenting:

This proceeding grew out of a lawsuit brought by the Oil Works against the Car Corporation to recover the difference between the mileage earnings paid by the railroads to the Car Corporation and those credited by the Car Corporation to the Oil Works on account of rental provided in the agreement of September 28, 1933. The Car Corporation defended the suit on the ground that the payment of the mileage earnings claimed would under our decisions constitute a rebate and violation of the Elkins Act. The District Court entered judgment for the Car Corporation. The judgment of the District Court was reversed by the Circuit Court of Appeals in 104 F. 2d 903, 906. The Circuit Court of Appeals stated that the reasons given by defendant for its refusal to pay the excess mileage earnings were as follows:

> (1) That the Car Corporation and not the El Dorado Company was the supplier of the cars to the railways; (2) that the monthly rental charge constituted the sole cost to the El Dorado Company in supplying the cars to the railways; and (3) that any amount paid by the railways to the shipper supplying them cars to carry its own oil, above this claimed actual cost to the supplier, reduced the shipper's *transportation cost* under the *freight* tariffs and, hence, that the payment by the Car Corporation to the El Dorado Company of the excess of car mileage tariff collections over rentals would constitute a rebate under the Elkins Act.

The Circuit Court of Appeals found that the agreement was a valid lease giving the Oil Works full control over the cars and making it the supplier of the cars to the railways; and that there was no proof that the cost to the Oil Works for furnishing the cars was less than the mileage earnings which accrued under the allowance of 1.5 cents per car per mile. It held that the Car Corporation had collected the mileage earnings as agent for the Oil Works and was properly accountable for the excess over the designated rentals.

Upon petition of the Car Corporation, the Supreme Court granted certiorari. With the consent of the Court we filed a brief as *amicus curiae*, in which we urged that we alone

had primary jurisdiction to determine a reasonable allowance for the facilities furnished. Subsequently, in *General American Tank Car Corporation* v. *El Dorado Terminal Company*, 308 U. S. 422, that Court pointed out that a railroad may own, lease, and furnish cars, or under the present practice the shipper may own, lease, or provide cars for its own use. It held that if the shipper is required to enter into an arrangement with a private car company, in order to obtain a car in which its products are transported, the shipper must be regarded as having furnished the car and is entitled to a just and reasonable allowance for providing the facility. It held further that we have exclusive primary jurisdiction to determine a just and reasonable allowance, which must be published in the tariffs and be at a uniform rate applicable to shippers properly classified by us. This clearly appears from the following excerpt taken from pages 429-430 of the opinion:

> As the Circuit Court of Appeals has pointed out, different shippers may have differing costs in respect of privately owned cars furnished the carriers. Nevertheless, as the allowances to be made them by the car- [fol. 657] riers for the use of such cars must be the subject of published schedules, and must be just and reasonable, the Commission is compelled to ascertain in the light of past and present experience a fair and reasonable compensation to cover such costs and prescribe a uniform rate which will reflect such experience. It is inevitable that some shippers may be able to furnish facilities at less than the published allowance while others may find their costs in excess of it. This fact, however, does not militate against the fixing of a uniform rate applicable to shippers properly classified by the Commission.

Now the majority says that the result of an investigation to determine the reasonableness of allowances for furnishing to carriers a class of tank cars such as these would be futile.

The finding in the report is that the shipper is entitled to his individual cost as indicated by the rental basis in the lease agreement. This finding is directly contrary to the quoted excerpt from the Supreme Court opinion which holds that a reasonable allowance must be at a uniform

rate and reflect the average condition of all shippers of the same class, and not the individual cost of a single shipper. The Supreme Court definitely pointed out that it was inevitable that such an allowance would yield a profit to some shippers and would be insufficient for others. The findings in the report is also contrary to our decision *In the Matter of Private Cars*, 50 I. C. C. 652, 683, wherein we stated as follows:

> The allowance that shall be paid for the use of private cars under all the circumstances and conditions shown must be considered on the average. There can not be, with propriety, as many different rates of payment as there are owners with varying ability to efficiently handle the cars with respect to mileage earnings, repairs, and depreciation, nor can there be as many rates as there are different kinds and grades of privately owned cars.

That decision, rendered in 1918, was the last time that we investigated the reasonableness of allowances for use of private cars, and we found that on the whole that the use of private cars rather than railroad-owned cars was beneficial to the public. However, in that proceeding we did not determine the amount of a reasonable allowance to be paid to shipper-lessees. The present record is inadequate to make such a finding, unless the allowance for a lessee should be the same as that of an owner. Although there are certain statements in the report reciting the elements entering into the cost of car ownership, there is no evidence on this subject in the record; likewise there is no evidence from which comparison of the costs of shipper-owners with those of shipper-lessees could be made. The Supreme Court observed (page 431) that it might "be found that the shipper is, in the result, obtaining transportation at a lower cost than others who use cars assigned them by the carriers or own their own cars," but there is no evidence in this record upon which such a conclusion could be predicated.

This record contains the following evidence concerning a reasonable allowance: For many years owners of tank cars have been paid by the railroads 1.5 cents per mile, loaded and empty. None of the parties questions the reasonable-
[fol. 658] ness of this allowance. In *Paragon Refining Co.*

v. *Alton & S. R. R.*, 118 I. C. C. 166, a proceeding of limited scope decided in 1926, division 4 found that a reasonable allowance for the future would be 1.5 cents per mile and awarded reparation on past shipments to the basis of 1 cent per mile. In the instant proceeding the Car Corporation submitted evidence showing that the operations of 96 per cent of the cars under similar contracts did not result in earnings in excess of the rentals, when credited with earnings on the basis of 1.5 cents per mile. Clearly the large earnings of the Oil Works were due to its continued and efficient use of the cars, and such a basis would not yield a profit to lessees under average conditions.

It is elementary that the form of an allowance for the use of cars must be such as to reflect the extent of the use by the railroads of the facilities furnished. Whenever we have had occasion to determine such allowances, we have prescribed either per diem or mileage allowances. The railroads can not be held responsible for the amount of rent reserved by the Car Corporation in an agreement with the shipper as the car may be left idle during the entire period. The car has value to the railroad only when it is used in transporting lading and results in the payment of freight charges.

Summarizing, the report fails to comply with the decision of the Supreme Court directing us to determine a reasonable allowance to be paid by the railroads for the use of tank cars furnished by the Oil Works, in that the basis is not in a form that can be published in a tariff and applied uniformly for all shippers of the same class. The conclusion of the report is based upon the cost of the individual shipper and not upon the use of the facility furnished. Thus the majority has merely taken over the function of the court and sought to determine who is entitled to the money in dispute.

Finally, in addition, it may be pointed out that the report goes beyond our province in finding that the alleged reasonable allowance "has been paid to the Oil Works through credits made to the account of the Oil Works by the Tank Car Corporation," which finding is in the very face of the holding of the Supreme Court (page 431):

> • • • The shipper was then entitled, under the plain terms of section 15 (13), to be paid by the carrier a just and reasonable allowance for providing the

facility. It seems clear that no rule or regulation of the carrier may provide for the payment of such allowance to any other person.

This proceeding is not of the slightest assistance to the carriers or to shippers leasing tank cars as to what would be a proper allowance for supplying such cars or whether or not that allowance in any respect should vary from the rate per mile now published as payable to car owners.

I am authorized to state that Commissioners Miller and Alldredge join in this expression.

Commissioner Johnson did not participate in the disposition of this proceeding.

[fol. 659] APPENDIX

This Agreement Made and entered into this 28th day of September 1933, by and between General American Tank Car Corporation, a West Virginia corporation, first party, and El Dorado Oil Works, a California corporation, second party;

Witnesseth:

First. First party does hereby lease and let unto second party, the second party does hereby rent and hire from first party, fifty (50) tank cars (hereinafter sometimes called "Permanent Cars"), all of which Permanent Cars shall be coiled tank cars of an approximate capacity of eight thousand (8,000) gallons each. Said Permanent Cars shall bear the reporting marks of the first party, or any other reporting marks which the first party may elect. Said Permanent Cars are now in the service of the second party under an agreement with the first party which expires December 31, 1933, and possession of said cars under said agreement expiring December 31, 1933, shall be and it is hereby agreed to be delivery to the second party by the first party of said Permanent Cars.

Second. All tank cars without compartments and non-insulated, of six thousand (6,000) gallon, eight thousand (8,000) gallon, and ten thousand (10,000) gallon capacity, without coils, or with coils up to six (6) lines, are hereinafter referred to as "standard tank cars." First party does hereby lease and let to the second party, and second party does hereby rent and hire from the first party, second party's entire requirements of standard tank cars over

and above said Permanent Cars. Such cars shall bear the reporting marks of the first party, or any other reporting marks which the first party may elect. Such cars shall be delivered to the second party at points on San Francisco Bay, designated by the second party, within a reasonable time after request therefor, subject to all delays due to fires, strikes, accidents, railroad embargoes and congestions, and all other and like causes beyond the control of the first party. All cars furnished hereunder, over and above said Permanent Cars shall not bear the name of the second party.

Second party covenants and agrees, in so far as it may lawfully do so, that it will use the tank cars of the first party exclusively, at all times during the term of this agreement, for the second party's entire requirements of standard tank cars, including all such requirements of second party's subsidiaries and other corporations as hereinafter specified, and that it will not use any standard tank cars of others during said term, provided first party's standard tank cars are available for loading at the time, upon reasonable notice, and if not so available, second party shall have the right to use the standard tank cars of others for the period during which the first party's tank cars are not so available. The term: "entire requirements of standard tank cars" wherever used in this agreement is intended to mean and shall be construed as meaning the number of standard tank cars needed by the second party during the term of this [fol. 660] agreement, over and above said Permanent Cars, for the transportation of the products of the second party, it being understood that the second party does and may, in its discretion, use means of transportation of the products of the second party, other than by rail, but that no other means of transportation shall be used or employed by the second party to the complete exclusion of transportation by rail in standard tank cars. A particular tank car furnished by first party to the second party hereunder, over and above said Permanent Cars, shall be considered as leased to the second party when made available by first party to second party upon reasonable notice, at points on San Francisco Bay, designated by second party, and shall continue to remain in the service of the second party until returned to the first party at Berkeley, California, or Oakland, California, as second party shall determine.

The term: "second party" as used herein shall include the Eldorado Oil Works and all existing and future subsidiary companies of Eldorado Oil Works and corporations controlled, operated or managed by Eldorado Oil Works.

Third. Second party agrees to use all the tank cars furnished hereunder exclusively in its service for the transportation of its products, which products will not injure or affect the tanks, and agrees that said cars shall not be shipped beyond the boundaries of the United States, Canada or Mexico, without the written consent of the first party. Second party further agrees to pay to the first party for the use of the Permanent Cars the sum of Twenty-seven and 50/100 Dollars ($27.50) per car per month, and for the use of the tank cars furnished hereunder, over and above said Permanent Cars, at the rate of Thirty Dollars ($30) per car per month, for the time such cars are in the service of the second party. Said payments shall be made to the first party at its office, 940 Continental Illinois Bank Building, Chicago, Illinois. Payment of the rental on said Permanent Cars shall be made on the first day of each month in advance, without deduction, except as set forth in paragraph Sixth hereinafter. Payment of the rental on the tank cars furnished by the first party to the second party hereunder, over and above said Permanent Cars, shall be made on the fifth (5th) day of each month, immediately following any month during which any of said cars have been in the service of the second party.

Fourth. This agreement is to remain in full force and effect for a period of three (3) years beginning January 1, 1934, and ending December 31, 1936. Second party shall have the right to extend the term of this agreement for an additional period of two (2) years, that is to say, until December 31, 1938, provided that it shall give to the first party notice in writing of its election so to extend this agreement, on or before December 1, 1936. Second party agrees upon the expiration hereof, to cause all of the cars covered hereby to be returned to the first party at Berkeley, California, or Oakland, California, and from time to time to cause all of the cars over and above the Permanent Cars, to be returned to the first party at Berkeley, California, or Oakland, California, as hereinbefore provided, all of said cars to be returned in the same condition in which they were furnished, excepting for ordinary wear and tear.

[fol. 661] Fifth. First party agrees to maintain all cars covered by this agreement in good condition and repair according to present requirements of railroad companies and existing American Railway Association Mechanical Rules. No repairs shall be made by the second party for the account of the first party without the written consent of the first party. If any of said cars be held in railroad or car shops for repairs for a period longer than five (5) days from the date when the damage to or wreck of such car is reported to the first party, then and in that event, rental or service charges covering such car shall cease from and after such period of five (5) days until such car is released from the shop, or until such car has been replaced by first party by another car. The first party shall have the right to substitute for any car leased hereunder, another car of the same type and capacity. The first party shall not be liable for any damage to or loss of the whole or any part of any shipment made in any of the cars covered by this agreement, nor for any loss or damage arising through injuries or fatalities to persons, nor for destruction of or damage to said cars of any other property, which may be caused by any explosion or breaking of said cars, or any parts thereof, or the use of said cars, and said second party agrees to protect and save harmless said first party from any such loss or damage to persons or property. If any of said cars are damaged or destroyed while on any privately owned tracks, the second party shall pay unto the first party the cost of repairing such damage or replacing such destroyed car or cars. The second party shall replace any removable tank parts (dome lids, outlet caps, safety valves, etc.), if lost or broken.

Sixth. The first party shall collect all mileage earned by the cars covered by this agreement and keep all records appertaining to their movements. Second party shall assist first party in following the movements of said cars by furnishing to the first party complete reports of the movements of cars, giving date, routing, and destination of each movement. The first party shall each month credit to the rental or service account of the second party all mileage earned by said cars while in the service of second party according to and subject to all rules of the tariffs of the railroads. Said mileage credit shall be reported to the second party on or about the twenty-fifth (25th) day of the month suc-

ceeding the month during which such mileage is earned. The second party agrees so to use said cars that their mileage under load shall be equal to their mileage empty on each railroad over which they move. Should the empty mileage on any railroad exceed the loaded mileage, the second party shall immediately upon the expiration or termination of this agreement, pay to the first party for such excess, as so much additional rental of service charge at the rate established by the tariff of the railroad on which such excess of empty mileage is incurred.

Seventh. It is mutually agreed that time of payment of rental or service charges is of the essence of this contract, and that if the second party shall make default in the payment of the rental or service charges for said cars at the time when the same become due and payable, and such default shall continue for five (5) days, or shall make default in the performance of any of the other agreements herein contained to be by it performed, and such default, other [fol. 662] than the non-payment of the rental or service charges shall continue for a period of thirty (30) days after written notice thereof, then and in any of said events the first party may terminate this agreement at its election, and the same shall become and be terminated, or may, at its election, take said cars out of the service of the second party and furnish the same, or any thereof to others for such rental or service charges and upon such terms as it may see fit, and if a sufficient sum shall not be thus realized after paying all expenses of retaking said cars and collecting the earnings thereof to satisfy the rental or service charges herein reserved, the second party agrees to satisfy and pay any and all such deficiency promptly upon demand, from time to time.

Eighth. This agreement shall be binding upon the parties hereto, their respective successors, representatives, administrators, and executors, but shall not be transferable by operation of law, or assignable by the second party, nor shall any rights hereunder with respect to said cars be transferred or assigned by the second party without the written consent of the first party. Should a petition in bankruptcy or a petition for a receiver be filed by or against the second party, or should it make an assignment for creditors, then this agreement may, at the option of the first party, be and become terminated. No title or leasehold or

property interest of any kind in said cars, or any of them shall vest in the second party or its successors or assigns under the terms and provisions of this service contract, or by reason of the delivery of possession of cars to the second party or its use thereof hereunder. No lettering or marking of any kind shall be placed upon said cars or any of them by the second party.

In Witness Whereof, the parties hereto have caused this instrument to be executed by their respective duly authorized officers, and attested by their Secretaries, and corporate seals to be hereunto affixed the day and year first above written.

General American Tank Car Corporation, by Leroy Kramer, President.

Attest: W. S. Hefferan, Jr., Secretary.

Eldorado Oil Works, by W. B. Reis, President.

Attest: S. M. Haslett, Secretary.

[fols. 663-687] ORDER

At a General Session of the Interstate Commerce Commission, Held at its Office in Washington, D. C., on the 10th Day of April, A. D. 1944

No. 28515

Allowances for Privately Owned Tank Cars

It appearing, That by order dated July 24, 1940, the Commission, in response to a joint petition filed by El Dorado Oil Works and El Dorado Terminal Company, instituted an investigation to determine the lawfulness of the practices under the terms of a contract dated September 28, 1933, between the El Dorado Oil Works and the General American Tank Car Corporation, and the reasonableness of the allowance to be paid by carriers by railroad for the use of tank cars furnished such carriers by the El Dorado Oil Works for the transportation of its products in interstate commerce during the period from January 1, 1934, to December 31, 1936:

It further appearing, That a full investigation of the matters and things involved has been had, and that the parties

have been fully heard, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the proceeding be, and it is hereby, discontinued.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 688] Before Interstate Commerce Commission

No. 28515

Allowances for Privately Owned Tank Cars

Order Denying Petition for Rehearing, etc.—July 31, 1944

Upon further consideration of the record in the above-entitled proceeding and consideration of the application for rehearing, reargument, and reconsideration filed by El Dorado Oil Works and El Dorado Terminal Company and of the replies filed by General American Transportation Corporation and by the respondents:

It is ordered, That the said petition be, and it is hereby, denied.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 689] Supreme Court of the United States

Statement of Points on Which Appellants Intend to Rely on Appeal—Filed September 26, 1945

I

The Three Judge District Court had jurisdiction under the Urgent Deficiencies Act (28 U. S. C. 41, subd. (28), 43, 45) to annul and set aside the order of the Interstate Commerce Commission and said court erred in dismissing Plaintiffs' complaint for want of jurisdiction.

II

The Three Judge District Court erred in dismissing Plaintiffs' complaint and in refusing to annul and set aside the order of the Interstate Commerce Commission thereby sanctioning the exercise by the Interstate Commerce Com-[fol. 690] mission of judicial powers vested in the District Court in an original action in assumpsit.

III

Contrary to the provisions of Section 15 (13) of the Commerce Act, the Commission determined in its Findings and Order that the rental paid under the car leasing contract was the maximum allowance to have been paid to the furnisher of the tank cars without regard to the reasonableness or uniformity of such an allowance.

IV

Contrary to the provisions of Section 15 (13) of the Commerce Act, the Commission failed and refused to make a proper investigation to establish a uniform and reasonable allowance for the future to be paid by the carriers to the furnisher of tank cars.

V

Contrary to the provisions of Section 15 (13) of the Commerce Act, the Findings and Order of the Commission sanctioned the payment of a higher allowance by the carriers to an owner of tank cars who had not furnished the tank cars than that determined by the Commission in the same order to be the maximum allowance to be paid to the furnishers of the tank cars.

VI

The Findings of the Commission that an allowance to the Oil Works by the carriers or the Tank Car Company under the car leasing agreement in excess of the car rentals would be unjust and unreasonable and would unduly prefer the Oil Works as a shipper was entirely without support in the evidence and was arbitrary and contrary to law.

VII

The finding of the Commission that the amount paid by the Tank Car Corporation to the Oil Works prior to July

[fol. 691] 1, 1934, under the terms of the car leasing agreement, to the extent that it exceeded the car rentals, was unjust and unreasonable and unduly preferred the Oil Works as a shipper, was not supported by any evidence and was contrary to all of the evidence in the record and, therefore, was arbitrary and properly subject to annulment under the Urgent Deficiencies Act.

VIII

The finding that if, in accordance with the car leasing agreement, the Oil Works was paid the car mileage collected by the Tank Car Corporation from the carriers, the Oil Works would thereby obtain the transportation of the commodity shipped by it in interstate commerce at a lower cost than others for use of cars assigned to them by the carriers, or who owned their own cars, is wholly unsupported by the evidence, and there was no evidence whatever upon the relative costs of furnishing tank cars by carriers or car owners, as distinguished from car renters, nor any evidence that car owners furnished tank cars to the carriers for transportation purposes or that the carriers furnished such cars to the shippers for the transportation of their commodities.

IX

The finding that a reasonable allowance "has been paid to the Oil Works through credits made * * * by the Tank Car Corporation" is contrary to the evidence and in excess of the power and authority of the Commission and, in effect, a decision of the issues before the District Court in the assumpsit action.

X.

The Commission's findings and order proceeded on an erroneous view of the law and, in effect, referred to the carriers the determination of the car rental paid by a shipper for the car or cars furnished by him to the carriers, which precluded a uniform mileage allowance and the disclosure [fol. 692] thereof in the published tariffs, as required by Section 15 (13) of the Commerce Act.

The accompanying Designation of Record to be Printed sets forth all of the record necessary to a proper consider-

ation and determination of the foregoing statement of points on which Appellants intend to rely upon this appeal.

Respectfully Submitted this 24th day of September, 1945.

————————, William B. Mead, Attorneys for Appellants. Williamson & Wallace, of Counsel.

[fol. 693] I hereby certify that the foregoing Statement of Points on Which Appellants Intend to Rely on Appeal was served upon each of the defendants and intervening defendants of record by mailing a copy thereof to counsel of record for said defendants and intervening defendants.

Dated: San Francisco, California, September 24, 1945.

Williamson & Wallace, by William B. Mead, Attorneys for Appellants.

[fol. 694] SUPREME COURT OF THE UNITED STATES

DESIGNATION OF RECORD TO BE PRINTED PURSUANT TO RULE 13 (3) OF THE RULES OF THE SUPREME COURT—Filed Sept. 26, 1945.

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Plaintiff's Exhibit No. 1 of the original exhibits transmitted with the Clerk's transcript by the Clerk of the District Court	

Dated: San Francisco, California, this 24th day of September, 1945.

———, William B. Mead, Attorneys for Appellants.

Williamson & Wallace, Of Counsel.

[fol. 696] I hereby certify that the foregoing Designation of Record to be Printed was served upon each of the Defendants and intervening defendants of record by mailing a copy thereof to counsel of record for said defendants and intervening defendants.

Dated San Francisco, California, September 24, 1945.

Williamson & Wallace, by William B. Mead, Attorneys for Appellants.

[fol. 697] [File endorsement omitted.]

[fol. 698] SUPREME COURT OF THE UNITED STATES

STIPULATION TO DIMINISH PRINTED RECORD—Filed November 7, 1945

The Appellants and Respondents in the above entitled court and cause heretofore designated the entire contents of Exhibit No. 1 (Certified copy of the proceedings before the Interstate Commerce Commission) to be printed as a part of the transcript of record.

It appearing however that certain portions of said Exhibit No. 1 being unnecessary to the consideration of the questions involved in the above entitled cause, the Appellants and Respondents therefore stipulate and agree that [fol. 699] the following portions of said Exhibit No. 1 need not be printed as a part of the transcript of record:

a. The Proposed Report of the Examiner of the I. C. C.

b. Petitioners' Exceptions to the said Proposed Report of the Examiner.

c. Transcript of oral argument before the I. C. C.

d. Petitioners' Application for Rehearing.

Dated: San Francisco, California, November 3, 1945.

W. F. Williamson, Williamson & Wallace, Attorneys for Appellants; J. Howard McGrath, Solicitor General, Counsel for United States of America; Daniel W. Knowlton, Counsel for Interstate Commerce Commission; W. S. Hefferan, Jr., Kenneth F. Burgess, Douglas E. Smith, Allan P. Matthew, Burnham Everson, Counsel for General American Transportation Corporation; J. Carter Fort, R. E. Wedekind, J. E. Hennessey, Starr Thomas, Counsel for The Alabama Great Southern Railroad Company, et al., Interveners, Attorneys for Respondents.

[fol. 699a] [File endorsement omitted.]

[fol. 700] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—October 15, 1945

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Mr. Justice Jackson took no part in the consideration or decision of this question.

Endorsed on Cover: Enter W. F. Williamson. File No. 50,131. Northern California, D. C. U. S. Term No. 428. El Dorado Oil Works and El Dorado Terminal Company, Appellants, vs. The United States of America, Interstate Commerce Commission, General American Transportation Corporation, et al. Filed September 13, 1945. Term No. 428 O. T. 1945.

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 428

EL DORADO OIL COMPANY AND EL DORADO TERMINAL COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL AMERICAN TRANSPORTATION COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATEMENT AS TO JURISDICTION

W. F. WILLIAMSON,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 428

EL DORADO OIL COMPANY AND EL DORADO TERMINAL COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL AMERICAN TRANSPORTATION CORPORATION, THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATEMENT AS TO JURISDICTION

In compliance with Paragraph 1 of Rule 12 of the Rules of the Supreme Court of the United States, El Dorado Oil Works and El Dorado Terminal Company submit herewith their statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause:

A. The statutory provisions believed to sustain that jurisdiction are Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, par. (4);

U. S. C., Title 28, Sec. 345), and Section 210 of the Judicial Code (38 Stat. 220, 28 U. S. C. 47a) and, particularly, the following provision thereof:

> "A final judgment or decree of the District Court in the cases specified in Section 44 of this Title may be reviewed by the Supreme Court of the United States if an appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases . . . ."

B. The Statutes of the United States, a construction of which is involved herein, are:

(1) The Act of October 22, 1913, c. 32, 38 Stat. 219 (28 U. S. C. 41, subd. (28), 43, 45), containing the following provisions vesting jurisdiction in the District Court to set aside and annul orders of the Interstate Commerce Commission and defining the venue of such Court:

> "*Setting aside order of Interstate Commerce Commission.* Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."

(2) The Act of October 22, 1913, c. 32, 38 Stat. 220, and Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. 44) defining the practice and procedure in such cases.

(3) The Act of March 3, 1911, c. 231, Sec. 208, 36 Stat. 1149 (Judicial Code Sec. 208, 28 U. S. C. 46).

C. The decree sought to be reviewed was entered on April 9, 1945, and the petition for appeal was presented to the District Court on June 1, 1945.

D. This action was brought by appellants (Plaintiffs below) before a three judge court, pursuant to the Urgent

Deficiencies Act (38 Stat. 219; 28 U. S. C. Secs. 41 (28) and 43-46, inclusive) to set aside, annul or suspend an order of the Interstate Commerce Commission issued April 10, 1944, in a proceeding entitled *Allowances for Privately Owned Tank Cars* and numbered 28515 in the files of the Interstate Commerce Commission (hereinafter called Commission).

The Commission, The General American Transportation Corporation and some eighty-eight (88) railroads intervened in the action, filing answers opposing the complaint of appellants.

The El Dorado Oil Works, appellant, is engaged in extracting coconut oil from copra in plants at Berkeley and Oakland, California. On September 28, 1933, El Dorado Oil Works entered into an agreement with General American Tank Car Corporation, predecessor of respondent, General American Transportation Corporation (herginafter called the Car Company), under which the Car Company leased to the El Dorado Oil Works 50 tank cars at a monthly rental of $27.50 per car. The Oil Works also agreed to take and the Car Company further agreed to supply the Oil Works with such additional tank cars as it might need at a monthly rental of $30.00 per car.

The agreement required the Car Company to collect all mileage earned under applicable railroad tariffs by the cars covered by the agreement and each month to credit to the rental or service account of El Dorado Oil Works all mileage earned by said cars while in the service of the Oil Works.

The cars were used by the El Dorado Oil Works for the transportation of its shipments of coconut oil in interstate commerce from Berkeley, California, principally to eastern points.

The tariffs of the carriers, though publishing a general provision for the payment of 1½ cents per car per mile, both loaded and empty, for the use of tank cars of private ownership, provided for the payment of mileage only to the

party whose reporting marks appeared on the cars and for a portion of the period covered by the car lease agreement stipulated that no payment would be so made to car lessees.

Up to July, 1934, the Car Company, pursuant to said agreement, collected the mileage allowances of 1½ cents per car mile set forth in the carriers' tariffs and paid them to the Oil Works. From that time on the Car Company refused to pay to the Oil Works any part of the said mileage allowances in excess of the monthly rental reserved in the agreement although the Car Company continued to receive the full mileage allowances from the carriers.

In June, 1935, the El Dorado Terminal Company, as assignee of its parent company, the El Dorado Oil Works, brought suit against the Car Company in the United States District Court for the Northern District of California, Southern Division, to recover the unpaid mileage earnings accrued from the use by the Oil Works of the leased cars up to May 31, 1935. These earnings amounted to $23,540.79 and had been collected by and retained by the Car Company. The Car Company denied liability on the ground that payment by it of mileage received in excess of the car rental paid by the Oil Works would constitute a rebate from published transportation rates in violation of the Elkins Act (49 U. S. C. 41). Judgment for the Car Company was rendered by the District Court, but was reversed on appeal by the Circuit Court of Appeals (104 Fed. (2d) 903). The Supreme Court granted certiorari and in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, held that an administrative question within the jurisdiction of the Commission being involved, the District Court should have stayed its hand pending the Commission's determination of the administrative question.

The Oil Works and the Terminal Company thereafter petitioned the Commission to cause an investigation to be

made of the questions involved and the practices disclosed by said action in the District Court. By order, dated July 24, 1940, the Commission instituted an investigation upon its own motion to determine:

> (1) Whether the practices involved under the terms and operations of the lease contract are unlawful in violation of the Interstate Commerce Act;
>
> (2) Whether a reasonable charge or allowance may be paid, and, if so, the amount thereof as a maximum to be paid, by the carrier or carriers by railroads for the use of the tank cars furnished such carriers by petitioners for the transportation of the products of petitioners in interstate commerce from Berkeley and Oakland, Calif., in the period January 1, 1934, to December 31, 1936; and
>
> (3) What findings shall be made, or what rules, regulations or practices shall be prescribed, or what orders shall be entered to remove any unlawfulness that may be found to exist.

The Commission thereafter made a determination to the effect that any allowances by the Tank Car Company to the Oil Works pursuant to the said agreement in excess of such car rentals were unjust and unreasonable and constituted an unlawful preference or rebate to the Oil Works as a shipper, contrary to the Elkins Act. After making the said determination, the Commission discontinued the proceeding by an order dated April 10, 1944.

Thereafter and in due time plaintiffs filed with the Commission an application for rehearing, re-argument and reconsideration of the matters covered by the said order of the Commission and particularly averred that the said order was incomplete, inadequate and erroneous that it was contrary to the evidence and unsupported by any evidence; that said order constituted an usurpation of the province

of the District Court in excess of the jurisdiction and authority of the Commission; also that the Commission had failed in said order to make findings on a material question as to what is a reasonable and uniform allowance to be made by Interstate Carriers to the furnishers of tank cars as a class as provided in Section 15 (13) of the Interstate Commerce Act; that its conclusions were not supported by findings of fact and that erroneous principles of law were applied by the Commission in its decisions and order. The said application for rehearing, re-argument and reconsideration was denied by order of the Commission on July 31, 1944.

E. The questions presented are substantial and of great importance. The decision of the three judge court in this case sanctions the exercise by the Commission of judicial powers vested in the District Court in respect of a civil action pending in the District Court and of which action said court had complete jurisdiction. (*General American Tank Car Corp.* v. *El Dorado*, 308 U. S. 422.) The public interest and the express provisions of the Act of October 22, 1913, c. 32, 38 Stat. 219 (28 U. S. C. 41, Subd. 28) require a determination of the scope of judicial review of an order of the Commission deemed "quasi-judicial" in character that by its terms discontinues a proceeding and in effect divests the District Court of its authority to determine a civil action pending before it.

There is also involved the scope of the authority of the Commission under Section 15 (13) of the Interstate Commerce Act (49 U. S. C. A.) to determine the compensation payable to shippers furnishing services or instrumentalities to carriers. The order of the Commission challenged in the three judge court purported to decide that payment by the Tank Car Company to the Oil Works in accordance with its agreement would amount to a rebate or discrimination prohibited by the Elkins Act. This was an unlawful usurpation

by the Commission of the legal authority of the District Court in the disposition of the action of which the Supreme Court in the decision of *General American Tank Car Corp.* v. *El Dorado*, 308 U. S. 422, had held that the District Court had complete and adequate jurisdiction.

The authority of the Commission under Section 15 (13) of the Interstate Commerce Act (49 U. S. C. A.) is limited to the fixing of a just and reasonable charge to be paid to the person furnishing the service or facility. The allowance so ascertained must be disclosed by the published tariffs and must be uniform. The Commission, however, refused to determine what would be a just and reasonable allowance with uniform application by stating "we cannot tell how far reaching the investigation would have to be."

The Commission failed, and in fact refused, to make a proper investigation under Section 15 (13) of the Interstate Commerce Act (49 U. S. C. A.). This breach of duty was coupled with an unlawful exercise of authority by the Commission in its attempt to decide the issue raised in the pending District Court action, that payment by the Tank Car Company to the Oil Works in accordance with the agreement would amount to a rebate or discrimination prohibited by the Elkins Act.

The question is substantial and it is of great public importance that an early determination be made of the proper scope of the Commission's application of Section 15 (13) of the Interstate Commerce Act.

The order of the Commission, if permitted to stand, would render the carriers unable to establish and publish a uniform allowance as contemplated by said Section 15 (13). The carriers also, if required to pay variable rentals would be forced to violate Section 2 of the Interstate Commerce Act which defines and prohibits unjust discrimination in respect of transportation charges. The order of the Commission has introduced considerable confusion in the field

of allowances by carriers for privately furnished services or facilities and requires an authoritative determination by the Supreme Court.

By its sanction of the payment by carriers to a car-owning company of the published mileage allowance although the cars in question were furnished by the lessee of the cars; and by its approval of such payments to the car-owning company instead of the car lessee the Commission in effect directly violated the provisions of Section 15 (13) of the Interstate Commerce Act in two respects: First by approving payment by the carriers to a person who had not furnished the service and, Second, by authorizing such payments in excess of the car rental which in the same order the Commission held to be the maximum allowance to be so paid. In prohibiting or disallowing any compensation in excess of car rentals to a shipper-lessee the Commission has in effect required the carriers to determine by their own media the amount paid or payable by the shipper-lessee for each tank car furnished the carriers for transportation purposes—which not only burdens the carriers but opens the door for the preferences and discrimination prohibited by the Interstate Commerce Act.

There is further involved the power of the Commission to make findings unsupported by any evidence and resting solely on a prior decision of the Commission in an entirely different proceeding. The Commission's conclusion, that an allowance to the Oil Works by the rail carriers or by the Tank Car Company under the agreement in excess of the car rentals would be unjust and unreasonable and would unduly prefer the Oil Works as a shipper of its commodities, was entirely without support in the evidence and was arbitrary.

The profit so realized was not a rebate or otherwise contrary to the provisions of the Elkins Act because the evidence shows without conflict that on all of the shipments

the carriers had received the full freight to which they were entitled under the applicable tariffs. The uncontradicted evidence showed that plaintiffs had not paid the freight, which was paid by consignees. Hence no rebate in freight could have been received by the Oil Works. The only support for this conclusion of the Commission is its decision in the *Refrigerator Car Case*, 201 I. C. C. 323. A finding without evidence or contrary to the evidence is arbitrary and baseless. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88.

It is important and of great public interest that the Supreme Court determine the standards of evidence required in a proceeding before the Commission and the power of the Commission to make findings and conclusions supported only by its own decision in an unrelated proceeding.

F. The following decisions sustain the jurisdiction of the Supreme Court to entertain an appeal in this case:

St. Louis & O'Fallon R. Co. v. *U. S.*, 279 U. S. 461, 73 L. Ed. 798.

Rochester Telephone Co. v. *U. S.*, 307 U. S. 125, 83 L. Ed. 1147.

Columbia Broadcasting Company v. *U. S.*, 316 U. S. 407, 86 L. Ed. 1563.

Eastern Central, etc., v. *U. S.*, 321 U. S. 194, 88 L. Ed. 668.

American Federation of Labor v. *National Labor Relations Board*, 308 U. S. 401, 84 L. Ed. 347.

Respectfully submitted,

W. F. Williamson,
Williamson & Wallace,
310 Sansome Street,
San Francisco 4, California,
Counsel for Appellants.

APPENDIX "A"

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Civil Action No. 23619-G

EL DORADO OIL WORKS, a Corporation, and EL DORADO TERMINAL COMPANY, a Corporation, *Plaintiff*,

vs.

UNITED STATES OF AMERICA, *Defendant*,

and

INTERSTATE COMMERCE COMMISSION, *Intervening Defendant*

Order Dismissing Action

Ordered:

1. The above entitled action is hereby dismissed with costs to defendant and intervenors.

2. Counsel for defendant may submit Findings of Fact and conclusions of law in conformity with Rule 52-A F. R. C. P.

Opinion filed.

Dated: March 6th, 1945.

CURTIS D. WILBUR,
United States Circuit Judge.
LOUIS E. GOODMAN,
United States District Judge.
A. F. ST. SURE,
United States District Judge.

(Endorsed:) Filed Mar. 7, 1945. C. W. Calbreath, Clerk.

APPENDIX "B"

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Civil Action No. 23619-G

EL DORADO OIL WORKS, a Corporation, and EL DORADO TERMINAL COMPANY, a Corporation, *Plaintiffs*,

vs.

UNITED STATES OF AMERICA, *Defendant*,

and

INTERSTATE COMMERCE COMMISSION, *Intervening Defendant*

W. F. Williamson, Williamson & Wallace, 310 Sansome Street, San Francisco, California, Attorneys for Plaintiff.

Robert L. Pierce, Special Assistant to the Attorney-General, Washington, D. C.; Frank J. Hennessy, United States Attorney, San Francisco, California; Attorneys for Defendant.

Daniel W. Knowlton, Washington, D. C., Attorney for Intervenor Interstate Commerce Commission.

W. S. Hefferan, Jr., Kenneth F. Burgess, Douglas F. Smith, Chicago, Illinois; Allan P. Matthew, Burnham Enersen, Balfour Building, San Francisco, California, Attorneys for General American Transportation Corporation, Intervenor.

J. Carter Fort, Guernsey Orcutt, C. A. Miller, Charles Clark, J. E. Hennessy, R. E. Wedekind, R. S. Outlaw, Starr Thomas, 114 Sansome Street, San Francisco, California, Attorneys for The Alabama Great Southern Railroad Company, et al., Intervenors.

Opinion

Before Honorable Curtis D. Wilbur, United States Circuit Judge; Honorable A. F. St. Sure, United States District Judge; Honorable Louis E. Goodman, United States District Judge.

GOODMAN, *District Judge:*

Plaintiff's bill of complaint, by which this three judge Court is asked to annul and vacate a decision of the Interstate Commerce Commission, culminates a long process of litigation.

In 1933, plaintiff, a processor of cocoanut oil, contracted with General American Transportation Corporation, owner of private tank cars, to rent a fixed number of the latter's tank cars at a stipulated monthly sum per car. By the agreement, the tank car company agreed to pay over to plaintiff the excess, if any, of the mileage income it received from railroad carriers over and above the stipulated monthly rental to be paid to it by plaintiff.

This agreement the tank car company performed until the following year, when the Interstate Commerce Commission, in a proceeding pending before it involving refrigerator cars, ruled payments of this kind to be improper. (Use of Privately Owned Refrigerator Cars, 201 I. C. C. 323-378.) Thereafter the tank car company refused to make any further such payments to plaintiff. Thereupon the plaintiff filed an action in assumpsit in this court to recover the sum of $18,532.78 alleged to be the amount of the accumulated payments due it. Judgment in favor of the defendant in that case was reversed by the Circuit Court of Appeals (104 Fed. (2d) 903, 9th Cir.)

The Supreme Court took over the cause on certiorari and reversed the Circuit Court of Appeals (General American Tank Car Corp. v. El Dorado Terminal Co. 308 U. S. 422) holding that the District Court should have stayed proceedings "when it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved" and "should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act." (i.e. Interstate Commerce Act.)

In so holding, the Supreme Court followed a like procedure which it earlier had invoked in Mitchell Coal & Coke Co. v. Penna. R. R. Co. 230 U. S. 247.

Thereafter, following a petition filed with the Interstate Commerce Commission by the plaintiff, the Commission in-

stituted and conducted an investigation upon the subject matter of the practice followed by plaintiff and the tank car company pursuant to the agreement between them.

After hearings, in which the plaintiff, the tank car company and numerous railroad carriers participated, the Commission made a determination whereby it decided in effect that the car rental paid by the plaintiff to the tank car company represented the plaintiff's only cost in furnishing the tank cars in which its (plaintiff's) shipments moved, and that any allowances, by the tank car company to the plaintiff pursuant to the agreement between them in excess thereof, were unjust and unreasonable and constituted an unlawful preference or rebate to plaintiff as shipper, contrary to the Elkins Act. After making the finding and determination aforesaid the Commission discontinued the proceeding.

Plaintiff now seeks to have this three judge court vacate and annul the decision of the Interstate Commerce Commission, urging that the same is not supported by the evidence before the Commission. The cause was submitted upon a certified copy of the proceedings before the Interstate Commerce Commission.

Defendant and intervenors urge that the three judge court lacks jurisdiction of the subject matter and that, on the merits, the record supports the finding and decision of the Interstate Commerce Commission.

We do not pass upon the merits of the cause inasmuch as we are of the opinion that this court, as constituted pursuant to the "Urgent Deficiencies Act" (38 Stat. 219; 28 U. S. C. Sec. 41 (28); Sec. 43-48), lacks jurisdiction of the subject matter.

By the Urgent Deficiencies Act the jurisdiction conferred on three judge district courts is in "cases brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission." By its finding and determination with respect to the practice here involved, the Interstate Commerce Commission made no decision which required any party to the proceeding before it to do or not to do any specific act. It followed the directions of the Supreme Court (General American Tank

Car Corp. v. El Dorado Terminal Co., supra) and determined, under the Interstate Commerce Act, the lawfulness and reasonableness of the practice which had obtained between plaintiff and the tank car company. When this was done, its job was done. It was not required to make any order and made none, and having completed its work, stamped "finis" thereon and discontinued the proceeding. Hence there is no order, in the sense contemplated in the statute, requiring review by this court. (U. S. v. Griffin, 303 U. S. 226, 233; U. S. v. Ill. Central R. R. Co. 244 U. S. 82; D. & H. Co. v. U. S. 266 U. S. 438; U. S. v. L. A. Ry. Co. 273 U. S. 299.)

Past transactions between plaintiff and defendant constitute the subject matter of the assumpsit action now pending in the District court. This is not a case of a presently existing practice declared unlawful by the Commission. Consequently there does not arise the right to apply for the equitable or injunctive relief provided by the statute to protect against irreparable damage.

The procedure specified by the Supreme Court in General American Tank Car Corp. v. El Dorado Terminal Co. supra, has been followed. The administrative practice involved has been passed upon by the Interstate Commerce Commission. The parties may now proceed in the assumpsit action. Therein, in our opinion, the court may determine plaintiff's cause and upon tender thereof, any competent defenses thereto.

The action will be dismissed with costs to defendant and intervenors. Counsel for defendant may submit findings of fact and conclusions of law in conformity with Rule 52-A F. R. C. P.

Dated: March 6, 1945.

(Endorsed:) Filed Mar 7 1945, C. W. Calbreath, Clerk.

APPENDIX "C"

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Civil Action No. 23619-G

EL DORADO OIL WORKS, a Corporation, and EL DORADO TERMINAL COMPANY, a Corporation, *Plaintiffs*,

vs.

UNITED STATES OF AMERICA, *Defendant*, and INTERSTATE COMMERCE COMMISSION, *Intervening Defendant*.

Findings of Fact and Conclusions of Law

The court makes the following findings of fact:

1. The El Dorado Oil Works is a California corporation engaged in crushing copra and extracting cocoanut oil therefrom in plants at Berkeley and Oakland, Calif., and shipping the product in tank cars in interstate commerce.

2. The El Dorado Terminal Company, a wholly owned subsidiary of the Oil Works Company, is also a California corporation, and during the times here involved it performed services for the Oil Works in the handling and shipping of its commodities.

3. The General American Tank Car Corporation, throughout the transactions hereinafter recited had its principal office at Chicago, Ill., and was the owner of numerous railway cars, including tank cars, which it furnished to various shippers for the transportation of their commodities. It was not affiliated with any railroad company by stock ownership or otherwise.

4. On September 28, 1933, the Oil Works entered into a written agreement with the Tank Car Corporation for the lease to the Oil Works during the period beginning January 1, 1934, and ending December 31, 1936, of 50 standard tank cars, referred to as permanent cars, at a rental of $27.50 per

month, and for such further number of tank cars as the Oil Works should require at a rental of $30 per month, the Oil Works agreeing, insofar as it could lawfully do so, to use the Tank Car Corporation's cars exclusively. The agreement provided, among other things, that the Tank Car Corporation should collect from rail carriers all mileage earned by the leased cars while in the service of the Oil Works and each month should credit the entire earnings to the rental account of the Oil Works. Pursuant to this agreement the Tank Car Corporation assembled and delivered the tank cars to the Oil Corporation. The Oil Corporation loaded the cars and delivered them to the carriers for transportation. The Tank Car Corporation as the owner of the cars involved collected from the railroads rental for the use of the cars, based on an allowance per mile for the distance for which they were used according to the tariffs filed by the railroads as required by law, but such tariffs did not provide for the payment of an allowance to the owner of the property transported from the plant of the Oil Works by reason of the furnishing of the tank cars therefor by the Oil Works as shipper-owner.

5. During the period from January 1 to July 1, 1934, the Tank Car Corporation paid over to the Oil Works mileage earnings of $7,219.54 in excess of the rental due from the Oil Works. After the latter date, assuming that such action would be necessary to comply with the principles enunciated by the Interstate Commerce Commission in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323, decided July 2, 1934, the Tank Car Corporation refused to pay over to the Oil Works any further excess mileage earnings, notwithstanding the terms of the lease agreement.

6. In June 1935, the Terminal Company, as assignee of its parent company, the Oil Works, sued the Tank Car Corporation in the United States District for the Northern District of California to recover unpaid excess mileage earnings which had accrued from the use of the leased cars up to May 31, 1935. The amount sued for, according to evidence of record, was for the difference between the rentals credited by the Tank Car Corporation to the Oil Works and the total amount of mileage earnings of the leased cars

received by the Tank Car Corporation from the carriers, during the period from January 1, 1934, to May 31, 1935, and amounts to $23,540.79. Judgment for the Tank Car Corporation was rendered by the district court, but was reversed on appeal by the circuit court of appeals, 104 Fed. (2d) 903, 916, which held the Oil Company was entitled to the full amount claimed. The Supreme Court granted certiorari.

7. Subsequently, in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, the Supreme Court held that the "reasonableness and legality of the practices of the parties was subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission," and that "when it appeared in the course of the litigation that an administrative problem, committed to the Commission was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act." The judgment of the circuit court of appeals was reversed and the cause remanded to the district court to be there held "pending the conclusion of an appropriate administrative proceeding" by the Commission.

8. There is also pending in the district court a second suit by the Oil Works for the recovery of unpaid excess mileage earnings which accrued between May 31, 1935, and the expiration of the contract, December 31, 1936.

9. Following the decision of the Supreme Court, the Oil Works and the Terminal Company on June 7, 1940, jointly petitioned the Interstate Commerce Commission to cause an investigation to be made of the practices disclosed by the action referred to and in the opinion of the United States Supreme Court. Upon consideration of that petition, by order dated July 24, 1940, the Interstate Commerce Commission instituted an investigation upon its own motion to determine:

> (1) whether the practices involved under the terms and operations of the lease contract are unlawful in violation of the Interstate Commerce Act;

(2) whether a reasonable charge or allowance may be paid, and, if so, the amount thereof as a maximum to be paid, by the carrier or carriers by railroads for the use of the tank cars furnished such carriers by petitioners for the transportation of the products of petitioners in interstate commerce from Berkeley and Oakland, Calif.; in the period January 1, 1934 to December 31, 1936; and

(3) what findings shall be made, or what rules, regulations, or practices shall be prescribed, or what orders shall be entered, to remove any unlawfulness that may be found to exist.

10. After hearing, in which the plaintiff, the tank car company, and numerous railroad carriers participated, the Commission made a determination whereby it decided in effect that the car rental paid by the plaintiff to the tank car company represented the plaintiff's only cost in furnishing the tank cars in which its (plaintiff's) shipments moved, and that any allowances, by the tank car company to the plaintiff pursuant to the agreement between them in excess thereof, were unjust and unreasonable and constituted an unlawful preference or rebate to plaintiff as shipper, contrary to the Elkins Act. After making the finding and determination aforesaid the Commission discontinued the proceeding. (258 I. C. C. 371).

11. Plaintiff filed this bill in this court, consisting of three judges under the Urgent Deficiencies Act of October 22, 1913, seeking to have the court vacate and annul the decision of the Interstate Commerce Commission, urging that the same is not supported by the evidence before the Commission. The cause was submitted upon a certified copy of the proceedings before the Interstate Commerce Commission.

12. Defendant and intervenors urge that the three judge court lacks jurisdiction of the subject matter and that, on the merits, the record supports the finding and decision of the Interstate Commerce Commission.

The Court makes the following conclusion of law:

1. The court has no jurisdiction of this suit, as the only jurisdiction it has is to set aside an "order" of the Inter-

state Commerce Commission, and there is no order involved here.

2. The action is dismissed with costs to defendant and intervening defendants.

CURTIS D. WILBUR,
United States Circuit Judge;
A. F. ST. SURE,
United States District Judge;
LOUIS E. GOODMAN,
United States District Judge.

Dated: March 28th, 1945.

(Endorsed:) Lodged March 21, 1945. C. W. Calbreath, Clerk. Filed Apr. 9, 1945. C. W. Calbreath, Clerk.

APPENDIX "D"

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Civil Action. No. 23619-G

ELDORADO OIL WORKS, a Corporation, and EL DORADO TERMINAL COMPANY, a Corporation, *Plaintiffs,*

vs.

UNITED STATES OF AMERICA, *Defendant,*

and

INTERSTATE COMMERCE COMMISSION, *Intervening Defendant.*

Final Decree

This cause having come on to be heard on complaint, answers to complaint, and proofs, and having been argued by counsel before the specially-constituted District Court convened pursuant to the provisions of law, and thereupon,

upon consideration thereof, it was determined, ordered, adjudged and decreed as follows:

The relief prayed for in the complaint is hereby denied and the complaint is dismissed at plaintiff's costs, for want of jurisdiction.

CURTIS D. WILBUR,
United States Circuit Judge;
A. F. ST. SURE,
United States District Judge;
LOUIS E. GOODMAN,
United States District Judge.

March 28th, 1945.

(Endorsed:) Lodged March 22, 1945. C. W. Calbreath, Clerk. Filed Apr. 9, 1945. C. W. Calbreath, Clerk.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 428

EL DORADO OIL COMPANY AND EL DORADO TERMINAL COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL AMERICAN TRANSPORTATION COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

APPELLANT'S REPLY TO MOTION TO AFFIRM

W. F. WILLIAMSON,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 428

EL DORADO OIL WORKS AND EL DORADO TERMINAL COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GREAT AMERICAN TRANSPORTATION CORPORATION, ET AL.

APPELLANTS' REPLY TO APPELLEES' BRIEF ON MOTION FOR AFFIRMANCE OF DECREE OF THE DISTRICT COURT.

Appellants instituted this action under the Urgent Deficiencies Act to annul and set aside an order of the Interstate Commerce Commission dated April 10, 1944, on the grounds that the Commission had no constitutional power to proceed as it did; that it exceeded its statutory authority and did not comply with the applicable statute, and finally, that its findings were not supported by the basic prerequisites of proof and, in fact, there was no evidence whatever to support those findings. These grounds are fully covered by the Statement as to Jurisdiction heretofore filed.

Counsel for Appellees concede that this appeal "presents a somewhat novel jurisdictional question" but they claim that the opinion of the Three Judge Court is correct and that its decree, from which this appeal was taken, should be affirmed without argument. In their argument they quote from the opinion of the Three Judge Court the statement that the Commission was not required in the proceeding before it to make any order, and in fact, made none and therefore there was no order for review by that court. They also argue that the Supreme Court in its disposition of the appeal that inspired the investigation proceeding before the Interstate Commerce Commission, had directed the Commission to investigate and decide a question or questions of administrative character for the guidance of the District Court, in which the original action in assumpsit is pending, and that the order of the Commission was ancillary to the assumpsit action and advisory to the District Court.

Appellants challenge both of these contentions. But in any view it is very clear that both cannot be correct. If the Commission made no order, it failed to perform its duty under Section 15 (13) of the Interstate Commerce Act and at the same time failed to follow the directive of the Supreme Court in *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422. If on the other hand the Commission passed upon the issues before the District Court in the original assumpsit action, either judicially or in an advisory capacity, it usurped the jurisdiction of that court. In so doing, it exceeded the administrative authority vested in it by Section 15 (13) of the Interstate Commerce Act and acted without authority under the Constitution.

Although the Supreme Court in deciding *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, *supra*, directed the District Court before which the original assumpsit action was pending to stay its hand until a deter-

mination was made by the Interstate Commerce Commission of the administrative question involved in the application of Section 15 (13) of the Interstate Commerce Act, the court did not define with particularity the administrative question reserved for decision by the Commission. Nor did it commit to the Commission the decision of judicial or non-administrative questions or broaden the authority of the Commission as expressed in the cited section. In the generalities of their argument, opposing counsel have lost sight of or disregarded the essential features of the controversy before the Commission and the questions involved. Whether those questions arose from the petition for investigation filed by the Appellants, or from the direction of the Supreme Court, or on the initiative of the Commission, the authority of the Commission in the matter of the allowance to be made to shippers or other furnishers of facilities to the carriers is embodied in Section 15 (13) of the Interstate Commerce Act. The Commission is required either upon application or on its own initiative to determine after investigation what is a just and reasonable allowance to be made by carriers to shippers or others furnishing facilities or services to the carriers which compensation must be just and reasonable, uniform as to all who furnish the services and embodied in the approved and published tariffs of the carriers. Counsel for Appellees and the Commission itself have considered the decision of the Supreme Court as a direction to the Commission to assist the District Court in deciding the issues there pending, and in fact to decide the legal questions involved in that case. In advancing this argument, counsel for Appellees have overlooked the fact that there was but one question at issue in the original assumpsit action. The Tank Car Corporation, the defendant there, admitted the car lease contract, made no question of its legality and also admitted the receipt and reten-

tion of the mileage paid by the carriers for the transportation of the tank cars in question. Its only defense was that a payment of the mileage allowance to the shipper, who furnished the cars to the carriers, would work a rebate or discrimination prohibited by the Elkins Act. The Supreme Court upheld the contract as legal in itself and recognized the validity of the tariff provisions for the payment of mileage of one and one-half cents per mile for car movements, and held that the Oil Works, Appellant here, had furnished the cars and was therefore entitled under the "plain provisions of Section 15 (13)" to receive the stated mileage allowance, but that as the published tariffs specified that the allowances would be paid only to the person whose recording marks were on the cars, and for a portion of the time, that they would not be paid to a lessee, the Oil Works, being a lessee and not having its recording marks upon the cars, was not entitled under the tariffs, as then in effect, to demand the mileage allowances from the carriers. At the same time said the Court the provisions of Section 15 (13), *supra*, must control the attempted limitations imposed by the carriers, and that the shipper could, as it had not then done, apply to the Interstate Commerce Commission for relief from these limitations. Referring then to the contention of the car corporation that the rental paid by the Oil Works as lessee shipper was substantially less than the mileage earned by the movements of the leased cars and therefore resulted in a profit to the shipper, the court observed that this was a question within the competence of the Commission. On the same subject, the court clearly indicated that there was no legal inhibition against making a profit and held that the Commission "is compelled to ascertain in the light of past and present experience a fair and reasonable compensation to cover such costs and pre-

scribe a uniform rate which will reflect such experience". *General American Tank Car Corp.* v. *El Dorado, supra*, page 430.

Section 15 (13) *supra*, is the yardstick by which the authority of the Commission must be measured and its action governed. Petitioners could not broaden or narrow that authority, nor would the Supreme Court assume by its decision to either enlarge or reduce the authority and the duty of the Commission as expressed in the statute.

Under the decisions of the Supreme Court, the jurisdiction of a Three Judge Court constituted under the Urgent Deficiencies Act turns upon the questions before the Interstate Commerce Commission and also upon the character of the decision and order given upon those questions. In an action where the lines are as closely drawn as they are in the instant case, a clinical study of those questions would seem to be proper, if not necessary, even at the risk of some repetition of the subject matter of Appellants' Statement as to Jurisdiction.

Since the Supreme Court in its decision of *General American Tank Car Corp.* v. *El Dorado Terminal Co., supra*, recognized the validity of the car leasing agreement, the acceptance by the carriers of tank cars and other facilities furnished by shippers and the payment of a mileage allowance of one and one-half cents per mile for that service; and that the shipper, Appellant here, had furnished the cars and was entitled under the provisions of Section 15 (13) of the Interstate Commerce Act to receive that compensation except for the limitation imposed by the carriers' tariffs that such payments would be made only to the registered owner and not to the lessee of the cars, the administrative questions requiring determination by the Commission were the following: First, what would be a just and reasonable compensation to be allowed in the future uniformly to all

furnishers of tank cars as a class in the light of the facts to be disclosed upon the investigation as to the cost and possible profits accruing to a shipper. Second, whether the carriers may properly stipulate in their published tariffs covering these allowances that payments would not be made to a shipper lessee notwithstanding the provisions of Section 15 (13) of the Commerce Act that such compensation should be paid to the furnishers of the cars or other facilities utilized in the transportation. The court did not intend to take the assumpsit case out of the hands of the District Court which was held to have jurisdiction. (*General American Tank Car Corp.* v. *El Dorado Terminal Co.*, page 428.) Nor did it intend that the Commission should investigate the factual conditions in previous years to determine whether the Oil Works as shipper lessee had made a profit in the past on leasing the tank cars, or whether the Tank Car Corporation should be relieved from performing its obligations as an agent or otherwise under the car leasing contract. Whether there had been a violation of the Elkins Act in the past was a question for the District Court to determine under the issues in the assumpsit action. It was not an administrative question committed to the decision of the Commission under the provisions of Section 15 (13) of the Commerce Act or the previous decisions of the Supreme Court. As to the future on the other hand, it was the province of the Commission after full investigation to determine what in the light of all the facts was a just and reasonable allowance to be made uniformly to the furnishers of tank cars as a class as compensation for that service and what, if any, direction should be given to the carriers with respect to their published stipulation that mileage payments would not be made to shipper lessees who furnished the cars. It would seem entirely clear that these were the administrative questions which the Supreme Court designed that the Commission would determine.

The Report and Order of the Commission

The report and order entered by the Commission on April 10, 1944, and which were the subject of challenge in the present action, not only failed to determine the administrative questions hereinbefore stated but assumed in excess of the constitutional authority of the Commission and of the special authority vested in it by Section 15 (13) of the Commerce Act to decide the civil action in assumpsit pending before the District Court. The Supreme Court in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, *supra*, held that the District Court had jurisdiction of that assumpsit action.

Counsel for Appellees have quoted in their brief certain findings from the report of the Commission. The quoted findings that an allowance by the carriers or the Tank Car Corporation in excess of the car rental would be unjust and unreasonable and would unduly prefer the Oil Works as a shipper, and that the amount paid by the Tank Car Corporation prior to July 1, 1934, under the terms of the car lease agreement, was to the extent that it exceeded the rentals, unjust and unreasonable and unduly preferred the Oil Works, were not supported by any evidence and in fact were directly contrary to all of the evidence upon that subject. The further finding that the Oil Works is entitled to no allowance from the carriers directly or through the Tank Car Corporation for the special cleaning and preparation of the tank cars was not, as to the carriers, a question before the Commission since the shipper (Appellants) expressly disavowed such a claim. As to the Tank Car Corporation, the question was also not involved. It could only be relevant in an investigation by the Commission as to the proper allowance to be paid by the carriers to the furnishers of tank cars as a class. That feature the Commission expressly by-passed although it was the important question

committed to it under the provisions of Section 15 (13) of the Interstate Commerce Act. The Commission finally ordered a discontinuance or dismissal of the proceeding before it.

Appellants instituted the present action under the Urgent Deficiencies Act to secure from the Three Judge Court a decree annulling and setting aside the above mentioned report and order. Counsel for Appellees admit that the case comes within the letter of the statute but they assert that the order was not reviewable under the Urgent Deficiencies Act and that is the basis of their motion to affirm.

Unless the administrative action falls within one of the excepted classes, it is subject to some form of judicial review if the other requisites for judicial action are met. The courts have on many occasions considered the reviewability of orders by administrative bodies and held that proprietary or legislative actions, or orders of a preliminary or procedural character are not reviewable. Counsel for Appellees do not contend that the order under attack may be properly assigned to either of these non-reviewable classes. Their argument is directed to support the decision of the District Court that the Commission made no decision requiring any party to the proceeding before it to do or not to do any specific act; that the Commission merely followed the directions of the Supreme Court in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, *supra*, and having done so discontinued the proceeding with the result that there was no order for review under the statute. The court noted four decisions to which we shall later refer.

We cite the following decisions of the Supreme Court holding such orders reviewable under the Urgent Deficiencies Act as against the jurisdictional challenge urged by counsel for the Appellees here.

Rochester Telephone Corp. v. *U. S.*, 307 U. S. 125, wherein the court analyzed the question of reviewability under the

Urgent Deficiencies Act and all of the decisions of the Supreme Court where that question was considered. The *Rochester* case pointed the rules for the decision of all the cases that have since come before the court involving this question.

Federal Power Commission v. *Pacific Power & Light Co.*, 307 U. S. 156, wherein the same court held that an order by the Federal Power Commission denying an application was reviewable, and presented "a case or controversy" within the constitutional requirements pertaining to Federal jurisdiction.

In *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, the court held that in determining whether an administrative order is subject to judicial review, it is immaterial that the order does not itself command action since administrative determinations which are not commands may for all practical purposes determine rights as effectually as the judgment of a court, and may be examined by courts under particular statutes providing for the review of "orders." The Interstate Commerce Act definitely provides for a review by a Three Judge District Court of orders of the Interstate Commerce Commission.

Mitchell v. *United States*, 313 U. S. 80. In that case the Supreme Court speaking through Mr. Chief Justice Hughes held that the negative form of an order of the Interstate Commerce Commission dismissing a complaint alleging discrimination does not foreclose the right of review whether or not further proceedings are to be had.

Columbia Broadcasting System v. *U. S.*, 316 U. S. 407. The proceeding was taken under the Urgent Deficiencies Act against an order of the Federal Communication Commission. The court inter alia held that the particular label placed by the Commission upon a matter decided by it is not conclusive on the question whether such matter is in the form of an order subject to review by the court, and if an

administrative order has the effect of penalizing or injuring a party; it is reviewable. An excerpt from the opinion of Mr. Chief Justice Stone in that case is peculiarly applicable.[1]

United States v. *New River*, 265 U. S. 533 (Page 540).

Alton Railroad Co. v. *U. S.*, 287 U. S. 299, definitely held that an order of the Interstate Commerce Commission which denies relief in part or which dismisses the proceeding may be reviewed, and that such action constitutes an "order" within the provisions of the Urgent Deficiencies Act.

Referring to the case of *United States* v. *Griffin*, 303 U. S. 226, and to the three other cases cited in the opinion of the Lower Court, counsel for Appellees assert that none of these four cases was overruled by the decision in *Rochester Telephone Corp.* v. *United States, supra.* In his analysis of all of the cases involving the reviewability of orders of the Interstate Commerce Commission, Mr. Justice Frankfurter referred to *United States* v. *Griffin* with the observation that that decision was based upon the ruling announced in *Procter & Gamble Co.* v. *U. S.*, 225 U. S. 282, but he expressly overruled that case. This effectively disposed of *United States* v. *Griffin* as authority.

The other three cases relied upon by the District Court are clearly distinguishable from the present:

In *United States* v. *Illinois Cent. R. Co.*, 244 U. S. 82, the court held that an order of the Commission fixing a future

[1] The purposes sought to be accomplished by Sec. 402(a) and the Urgent Deficiencies Act would be defeated if a suitor were unable to resort to them to avoid reasonably anticipated irreparable injury resulting from such legal consequences of the Commission's order, merely because the Commission as yet has neither refused to renew a license, as the regulations require, nor cancelled a license, as the regulations permit. Such an argument addressed to the form rather than the substance of the order was rejected in Powell v. United States 300 U. S. 276, 81 L. ed. 643, 57 S. Ct. 470, supra; cf. American Federation of Labor v. National Labor Relations Bd. supra (308 U. S. 408, 84 L. ed. 351, 60 S. Ct. 300).

day and place for the hearing of complaints by certain coal companies growing out of the failure of carriers to furnish coal-cars upon demand, was not an "order" for review by a Three Judge Court within the meaning of the statute because the order merely served as a continuance of the hearing. As authority for its ruling, the court cited *Procter & Gamble Co.* v. *United States*, *supra*.

Delaware & Hudson R. Co. v. *United States*, 266 U. S. 438, determined that a tentative valuation of railroad property by the Interstate Commerce Commission was no more than an ex parte appraisal and that an action does not lie under the statute to annul such valuation.

United States v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, again involved a determination by the Interstate Commerce Commission as to the value of the property of a railroad carrier. The suit was instituted under 19a j of the Interstate Commerce Act to set aside an order of the Interstate Commerce Commission valuing the property of the railroad carrier. The Supreme Court held that the District Court in which the action was filed may stay the proceeding and permit the Commission to amend its order upon further consideration of the evidence, but that injunction did not lie against the order of the Commission simply because the report may injure the credit of the railroad with the public or because it may become the basis of subsequent rate making proceedings. The Urgent Deficiencies Act or proceedings under it was not involved.

In further support of the action of the District Court, counsel for Appellees also cite *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, and *Chicago & Northwestern Railway Co.* v. *United States*, ID 718. The first of the cited cases was before the Supreme Court on writ of certiorari to the United States Court of Appeals for the District of Columbia to review a judgment affirming a judgment of the District Court which sustained a determination

by the National Mediation Board under the Railway Labor Act as to the proper participants in an election of a collective bargaining representative. It was held that the District Court has not authority to review the action of the National Mediation Board in large part because the act under consideration gave to the complainants a precise and different remedy. The cited case did not involve the authority of a Three Judge Court constituted under the Urgent Deficiencies Act. The reviewability of an order of the Interstate Commerce Commission under the act of October 22, 1913, c. 32 (28 U. S. C. 41 Subd. (28 43-45)) was in no manner involved.

The memorandum opinion in *Chicago & Northwestern Railway Co.* v. *United States*, 320 U. S. 718, which is also cited by counsel for the Appellees, does not touch the question before the court in the present case at any point. In a bankruptcy proceeding involving the railroad, the Interstate Commerce Commission had entered an order as to the railroad organization which was subsequently confirmed by the District Court. The memorandum opinion merely held that an appeal from such order of the Interstate Commerce Commission lies only to a District Court of one judge sitting in the bankruptcy proceeding and not to a District Court of three judges assembled under the Urgent Deficiencies Act.

Although counsel for Appellees concede that the "negative order doctrine" is no longer effective, their contention which we have considered in the foregoing pages that the Commission's order of April 10, 1944, did not command anything to be done by any party and merely dismissed the proceeding or was not an order at all, is merely an attempted invocation of the "negative order doctrine" and is answered by the decisions of the Supreme Court in

Rochester Telephone Corp. v. United States, 307 U. S. 125, and *Mitchell v. United States*, 313 U. S. 80.

In further support of the motion to affirm, counsel for the Appellees urge that the action of the Commission here involved "was merely an ancillary step in the pending action of assumpsit brought by the shipper against the car company" and that the commission in its decision "was simply facilitating the conduct of the assumpsit action by performing a task referred to it in the course of the pending law suit." We have in the earlier pages of this brief shown, we believe, that the Supreme Court in deciding *General American Tank Car Corp. v. El Dorado Terminal Co., supra*, did not confer upon the Interstate Commerce Commission any authority to decide the assumpsit action pending in the District Court, nor did it command or authorize the Commission to take any "ancillary" step (to use counsels' term) in the pending action, or to aid the District Court in determining any of the issues in the assumpsit action.

To support their contention that the Commission's report and order was quasi judicial and mere findings, counsel for Appellees cite *United States v. Atlanta*, *United States v. Griffin* and *United States v. Illinois Cent. R. Co.*, which we have heretofore discussed. They also cite *Shannahan v. United States*, 303 U. S. 596 and *Shields v. Utah Idaho R. Co.*, 305 U. S. 177. Those cases do not support the contention of opposing counsel. In the *Shannahan* case a Three Judge Court had dismissed a suit to set aside the decision of the Interstate Commerce Commission as to the applicability to a certain electric railway of the exemption provisions of the Railway Labor Act. The act contained a provision excepting from its effect interurban electric railways not a part of a general steam-railroad system, and directed the Interstate Commerce Commission upon request of the Mediation Board, or upon complaint, to determine

whether an electric line fell within the terms of the exemption. In affirming the decision of the Lower Court dismissing the action, the Supreme Court held (page 599) that under the terms of the act "the function of the Commission was limited to the determination of a fact. Its decision was not in the form of an order and had no characteristic of an order either affirmative or negative". The court further held that the act of the Commission was merely intermediate or preparatory.

Shields v. *Utah Idaho R. Co.*, *supra*, was an action instituted before a One Judge District Court to enjoin the United States Attorney from prosecuting the complainant railroad and its officers for violation of the provisions of the Railway Labor Act. Acting under that act as in the *Shannahan* case the Commission had determined as a fact that the electric railway was subject to the provisions of the statute. The District Court was not asked to review, nor did it review, the order of the Commission. The question before that court was whether the Commission's order determining that the electric railway was subject to the provisions of the Railway Labor Act was binding upon the railway company in its relations with its employees. There was no attack upon the determination of the Commission. Nor is the case authority for the further contention of opposing counsel that the One Judge District Court before whom the original assumpsit action is pending has authority to annul, set aside or review the order of the Interstate Commerce Commission. That authority is committed solely to a Three Judge District Court constituted as provided in the Urgent Deficiencies Act.

In an effort to escape the effect of the decision in *Rochester Telephone Corp.* v. *United States*, *supra*, counsel for Appellees urge that the case was concerned only with the negative order doctrine and expressly distinguished

such cases as *United States* v. *Illinois Cent. R. Co.*, *United States* v. *Los Angeles & S. L. R. Co.*, and *Shannahan* v. *United States*, previously cited by Appellees and considered in the earlier pages of this brief. While it is true that the decision in the *Rochester* case was devoted particularly to the negative order doctrine, Mr. Justice Frankfurter made an exhaustive analysis of reviewable and non-reviewable orders and in the course of that analysis cited the cases above mentioned as illustrating negative and non-reviewable orders. But that pronouncement cannot serve the purpose of opposing counsel or classify the order under present attack either as negative or non-reviewable. Even while the "negative order doctrine" as announced in *Procter & Gamble Co.* v. *United States* was in favor an administrative order unsupported by evidence or made without hearing or in excess of constitutional limits or for some other reason amounted to an abuse of power was held to be reviewable by the courts. (*Manufacturers Railway Co.* v. *United States*, 247 U. S. 457.)

Counsel for Appellees attempt to justify the order of the Commission under attack on the claim that the Commission's findings were directed to the prevention of the payment of excess compensation to a shipper and the accomplishment of an illegal rebate by such action. On the present motion, we are not concerned with the Commission's intention except as reflected by its findings and order and as to those the question is whether the action of the Commission was reviewable under the plain terms of the statute. Prevention of the payment of excess compensation was a matter within the jurisdiction of the Commission to be disposed of by an order applicable to the future. The assumpsit action pending in the District Court involved only the right of the shipper lessee to collect from the Tank Car Corporation, as provided in the lease agreement, the mileage previ-

ously collected from the carriers for the use of tank cars furnished by the shipper during the years 1934 and 1935. The Tank Car Corporation in the action referred to defended upon the sole ground that such payment would constitute an illegal rebate under the Elkins Act. There was no issue as to the legality of the contract or the amount of the mileage allowance, nor did the shipper lessee (Appellant here) make any claim against the carriers. The Commission did not determine as required under the provisions of Section 15 (13) of the Interstate Commerce Act what was a just and reasonable compensation to be paid in the future by the carriers to the furnishers of tank cars uniformly as a class. It deliberately avoided that subject with a statement that the investigation would be too greatly extended. Counsel assert that the Commission by its findings authoritatively fixed the reasonable amount of allowance payable to the shipper but decided it was without authority to enter orders directing the payment thereof either by the car company or by the carrier. Counsel also assert that the car company was not subject to the Commission's authority. If the Commission was without authority to require the car company to pay in accordance with its agreement the mileage received by it, it was equally without authority to release the car company from its obligations so to do under the agreement. Yet the effect of the Commission's findings and order was to deny to plaintiffs the right to recover under the lease contract and to permit the Tank Car Corporation to retain the mileage which it had collected from the carriers as mileage allowances for the tank car facilities furnished by the Appellants, as shippers, notwithstanding the provision of the statute that such allowances could be paid and was only authorized for the benefit of the furnishers of the facilities. On the basis of the claim of opposing counsel that the Commission "authoritatively fixed"

the amount of the allowance payable to the shipper, it would seem very clear that the Commission attempted to or did decide the assumpsit case pending in the District Court, of which case the Supreme Court in *General American Tank Car Corp.* v. *El Dorado Terminal Co., supra*, held the District Court had jurisdiction. This was an unconstitutional assumption of authority on the part of the Commission and in excess of the authority conferred by Section 15 (13) of the Interstate Commerce Act. That condition presented a case or controversy that was reviewable by a Three Judge Court under the Urgent Deficiencies Act. (*Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156.) Any question as to whether there had been in the past a breach of the Elkins law or the Interstate Commerce Act or a failure to conform to the published tariffs, was a matter for the decision of the District Court before which the action in assumpsit was pending. It was not a question within the competence of the Commission. The distinction between the authority of the Commission on the one hand and that of the courts on the other, was clearly stated by the Supreme Court in its decision in the case of *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285. The court there pointed out the difference between questions as to the force of a statute or the construction of a tariff, and questions as to technical matters involved in the framing of tariffs or rules. Questions of the first type were held to be subject to determination by the courts. The court further stated "To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function". The same court also held in *Ellis* v. *I. C. C.*, 273 U. S. 434, that the Commission is without authority over those who are not

carriers in the public service. This lends support to the theory of opposing counsel that the Commission was without authority over the Tank Car Corporation or the fulfillment of its obligations, but it also supports our contention that the Commission was without authority to relieve the Tank Car Corporation of its existing obligations.

On the basis of the claims of opposing counsel that the Supreme Court in its decision of *General American Tank Car Corp.* v. *El Dorado Terminal Co., supra*, directed that the District Court should stay its hand until the Interstate Commerce Commission could decide certain questions and that the Commission in the findings and order under challenge had decided those questions, the District Court would naturally consider the findings of the Commission as binding and as stated by opposing counsel "authoritative", and render its decision in the assumpsit suit accordingly. Thus the authority of the court would have been exercised by the Commission. Counsel for Appellees argue however that the District Court may in a trial of the assumpsit action determine the propriety and validity of the Commission's order. In other words it may accept or annul the order of the Commission. It is a sound rule of statutory construction that where the statute provides for a review of an order by a particular court, as in this case, that authority is exclusive and denies a right of review by any other court or body. The case of *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, previously cited by Appellees' counsel declares no other rule. That case did not involve a question of review.

Counsel for Appellees also argue that the requisites of equity jurisdiction must exist to warrant review under the provisions of the Urgent Deficiencies Act. The statute under which this action was filed definitely provides that a court constituted of a Three-Judge Court shall have jurisdiction to enjoin, set aside, annul or suspend any

order of the Interstate Commerce Commission. The act provides for a statutory review. In the case of a "statutory review" the statute is the measure by which the jurisdiction should be determined. Since it is a review provided by statute for given orders, it is only necessary that the order sought to be reviewed be within the orders listed in the statute. Admittedly that is so in the instant case. Therefore, it is not necessary that all of the criteria of equity jurisdiction shall be established in the bill of complaint where as in this case the order (which embraced by reference the findings as well) was made by the Interstate Commerce Commission in its administrative capacity. The claim that the complainant, Appellant here, is not faced with any immediate threat of interference with its rights, would seem to be completely answered by the fact, admitted by opposing counsel, that the order of the Interstate Commerce Commission was an "authoritative decision" of the questions involved in the assumpsit case pending before the District Court. Whatever else may be said of the report and order under attack, and whether it is classed as ancillary to the civil action or quasi judicial, it effectively denied to the Appellants, as lessees of the tank cars, the right to recover the moneys to which they were entitled under the terms of the car lease agreement, and furthermore determined that what they had so received in the past under that agreement was improperly paid to them. They were therefore aggrieved in their property rights. This constituted a case or controversy within the jurisdiction of the Three-Judge Court under the Constitution and the Urgent Deficiencies Act. (*Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125, and *Mitchell* v. *U. S.*, 313 U. S. 80.) We believe that the order of the Commission under challenge in the Lower Court was made in excess of the constitutional power of the Commission; that it was contrary to and in excess of the statutory authority

of the Commission and that the findings on the questions that were decided were not supported by any evidence before the Commission. The order was therefore subject to review by the Lower Court under the provisions of the Urgent Deficiencies Act and Appellees' motion to affirm should be denied.

Respectfully submitted,

W. F. WILLIAMSON,
Counsel for Appellants.

WILLIAMSON & WALLACE,
Of Counsel.

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In the Supreme Court

OF THE

United States

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CHARLES ELMORE CROPLEY

OCTOBER TERM, 1945

No. 428

EL DORADO OIL COMPANY and EL DORADO TERMINAL COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL AMERICAN TRANSPORTATION COMPANY, et al.

Appellees.

Appeal from the District Court of the United States for the Northern District of California.

BRIEF FOR APPELLANTS.

W. F. WILLIAMSON,
310 Sansome Street, San Francisco 4, California,
Counsel for Appellants.

WILLIAM B. MEAD,
WILLIAMSON & WALLACE,
310 Sansome Street, San Francisco 4, California,
Of Counsel.

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In the Supreme Court
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Appellees.

Appeal from the District Court of the United States for the Northern District of California.

BRIEF FOR APPELLANTS.

JURISDICTION.

1. The final decree of the Three Judge District Court organized pursuant to the Urgent Deficiencies Act (38 Stat. 219; 28 U.S.C. Secs. 41 (28) and 43-46, inclusive) was entered on April 9, 1945.

2. The petition for appeal was presented to and allowed by the said District Court on June 1, 1945. The record on appeal was filed within the time allowed by law. (R. 42, 43.)

3. The jurisdiction of this Court is invoked under Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, par. (4).; U.S.C., Title 28, Sec. 345) and Section 210 of the Judicial Code (38 Stat. 220, 28 U.S.C. 47a).

4. This Court on October 15, 1945, entered its order noting probable jurisdiction and transferring the case to the summary docket. (R. 267.)

OPINION OF DISTRICT COURT.

The opinion below is reported in 59 Fed. Supp. 738.

STATEMENT OF THE CASE.

This action was brought by appellants (plaintiffs below) under the Urgent Deficiencies Act to annul and set aside an order of the Interstate Commerce Commission dated April 10, 1944, in a proceeding entitled "Allowances for Privately Owned Tank Cars" and numbered 28,515 in the files of the Commission. (R. 1.) The action was based on the grounds that the Commission had no constitutional power to proceed as it did; that it exceeded its statutory authority and did not comply with the plain provisions of Section 15 (13) of the Interstate Commerce Act (see Appen-

dix A), and that its findings were not supported by proof and there was no evidence whatever to support those findings. (R. 1-5.)

The United States, the Interstate Commerce Commission, The General American Transportation Corporation and some eighty-eight (88) railroads filed answers opposing the complaint of appellants. (R. 6, 11, 22, 29.)

Thereafter, the Three Judge District Court on April 9, 1945, issued its final decree dismissing the action and denying the relief prayed for by plaintiffs on the ground of want of jurisdiction. (R. 40.)

The El Dorado Oil Works, appellant, is engaged in extracting coconut oil from copra in plants at Berkeley and Oakland, California. On September 28, 1933, El Dorado Oil Works entered into an agreement with General American Tank Car Corporation, predecessor of respondent, General American Transportation Corporation (hereinafter called the Car Company) under which the Car Company leased to the El Dorado Oil Works 50 tank cars at a monthly rental of $27.50 per car. (R. 52, 54.) The Oil Works also agreed to take and the Car Company further agreed to supply the Oil Works with such additional tank cars as it might need at a monthly rental of $30.00 per car. (R. 54, 55.)

The agreement required the Car Company to collect all mileage earned under applicable railroad tariffs by the cars covered by the agreement and each month to credit to the rental or service account of El Dorado Oil Works all mileage earned by said cars while in the service of the Oil Works. (R. 52, 55-56.)

The cars were used by the El Dorado Oil Works for the transportation of its coconut oil in interstate commerce from Berkeley, California, principally to eastern points.

The tariffs of the carriers, though containing a general provision for the payment of 1½ cents per car per mile, both loaded and empty, for the use of tank cars of private ownership, provided for the payment of mileage only to the party whose reporting marks appeared on the cars, and for a portion of the period covered by the car lease agreement, stipulated that no payment would be so made to car lessees. (R. 110-120.)

Up to July, 1934, the Car Company collected the mileage allowance of 1½ cents per car mile set forth in the carriers' tariffs, and pursuant to its agreement paid them to the Oil Works. From that time on the Car Company refused to pay to the Oil Works any part of the said mileage allowances so collected by it, in excess of the monthly rental reserved in the agreement, although the Car Company continued to receive the full mileage allowances from the carriers.

In June, 1935, the El Dorado Terminal Company, as assignee of its parent company, the El Dorado Oil Works, brought suit against the Car Company in the United States District Court for the Northern District of California, Southern Division, to recover the amount so collected as mileage earnings and retained by it, accrued from the use by the Oil Works of the leased cars up to May 31, 1935. (R. 43, 49.) These earnings amounted to $23,540.79 and had been collected by and retained by the Car Company. The Car Com-

pany denied liability on the ground that payment by it of mileage received in excess of the car rental paid by the Oil Works would constitute a rebate from published transportation rates in violation of the Elkins Act. (49 U.S.C. 41.) Judgment for the Car Company was rendered by the District Court but was reversed on appeal by the Circuit Court of Appeals. (104 Fed. (2d) 903.) The Supreme Court granted certiorari and in *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, held that an administrative question within the jurisdiction of the Commission being involved, the District Court should have stayed its hand pending the Commission's determination of the administrative question.

The Oil Works and the Terminal Company thereafter petitioned the Commission to cause an investigation to be made of the questions involved and the practices disclosed by said action in the District Court. (R. 43.) By order, dated July 24, 1940 (R. 241), the Commission instituted an investigation upon its own motion to determine:

> (1) Whether the practices involved under the terms and operations of the lease contract are unlawful in violation of the Interstate Commerce Act;
>
> (2) Whether a reasonable charge or allowance may be paid, and, if so, the amount thereof as a maximum to be paid, by the carrier or carriers by railroads for the use of the tank cars furnished such carriers by petitioners for the transportation of the products of petitioners in interstate com-

merce from Berkeley and Oakland, Calif., in the period July 1, 1934, to December 31, 1936; and

(3) What findings shall be made, or what rules, regulations or practices shall be prescribed, or what orders shall be entered to remove any unlawfulness that may be found to exist.

The Commission thereafter made a determination to the effect that any payments by the Tank Car Company to the Oil Works pursuant to the said agreement in excess of such car rentals are unjust and unreasonable and constituted an unlawful preference or rebate to the Oil Works as a shipper, contrary to the Elkins Act. (R. 237.) After making the said determination, the Commission discontinued the proceedings by an order dated April 10, 1944. (R. 260, 261.)

Thereafter and in due time plaintiffs filed with the Commission an application for rehearing, re-argument and reconsideration of the matters covered by the said order of the Commission and particularly averred that the said order was incomplete, inadequate and erroneous, that it was contrary to the evidence and unsupported by any evidence; that said order constituted an usurpation of the province of the District Court in excess of the jurisdiction and authority of the Commission; also that the Commission had failed in said order to make findings on a material question as to what is a reasonable and uniform allowance to be made by Interstate Carriers to the furnishers of tank cars as a class as provided in Section 15 (13) of the Interstate Commerce Act; that its conclusions were not

supported by findings of fact and that erroneous principles of law were applied by the Commission in its decision and order. The said application for rehearing, re-argument and reconsideration was denied by order of the Commission on July 31, 1944. (R. 261.)

ISSUES INVOLVED.

(1) The decision of the Three Judge District Court in this case sanctions the exercise by the Commission of judicial powers vested in the District Court in the pending action of assumpsit of which action the District Court has complete jurisdiction. Such decision is contrary to the express provisions of the Act of October 22, 1913, c. 32, 38 Stat. 219 (28 U.S.C. 41, Subd. (28)), and in effect divests the District Court of its authority to determine the pending action of assumpsit.

(2) The order of the Commission challenged in this case purported to decide that payment by the Tank Car Company to the Oil Works in accordance with its agreement would amount to a rebate or discrimination prohibited by the Elkins Act. The authority of the Commission under Section 15 (13) of the Interstate Commerce Act is limited to a determination of what is a just and reasonable allowance to be made by carriers to shippers or others furnishing facilities or services to the carriers which compensation must be just and reasonable, uniform as to all who furnish the services and embodied in the approved and published

tariffs of the carriers. The Commission, however, refused to determine what would be a just and reasonable allowance with uniform application by stating, "we cannot tell how far-reaching the investigation would have to be". (R. 249.)

(3) The Commission's conclusion that the allowance by the carriers or the Tank Car Corporation to the Oil Works in excess of the car rentals paid under the terms of the car lease agreement, was unjust and unreasonable and unduly preferred the Oil Works to the extent that it exceeded the rentals, was not supported by any evidence and was directly contrary to all of the evidence and was arbitrary. The Commission lacks power to make findings or conclusions unsupported by any evidence and resting solely on a prior decision of the Commission in an entirely different proceeding.

SPECIFICATION OF ERRORS.

(1) The Three Judge District Court erred in dismissing the complaint of plaintiffs for want of jurisdiction. (R. 42.)

(2) The Three Judge District Court erred in denying the relief prayed for in the complaint of plaintiffs. (R. 42.)

ARGUMENT.

I.

AN ORDER OF THE INTERSTATE COMMERCE COMMISSION DISCONTINUING A PROCEEDING THAT IN EFFECT PURPORTS TO MAKE "AUTHORITATIVE" FINDINGS OF FACT AND TO ESTABLISH RULES OF LAW INVOLVING PROPERTY RIGHTS IS REVIEWABLE UNDER THE URGENT DEFICIENCIES ACT.

The Three Judge District Court, organized under the Urgent Deficiencies Act, Act of October 22, 1913, c. 32, 38 Stat. 219 (28 U.S.C. 41, Subd. (28) 43, 45), had full and complete jurisdiction to annul and set aside the order of the Interstate Commerce Commission (R. 260, 261) that was subjected to attack by the complaint of plaintiffs (appellants). (R. 1-5.) The order of the Commission, although in form a discontinuance of an investigative proceeding, in effect was an attempt by the Commission to make "authoritative" findings of fact and conclusions of law (R. 237-250), with respect to the action of assumpsit between appellants and intervenor, Car Company, then and now pending in the United States District Court.

The order of the Commission is subject to review under the express terms of the Urgent Deficiencies Act, Act of October 22, 1913, c. 32, 38 Stat. 219 (28 U.S.C. 41, Subd. (28)), which provides:

> "Setting aside order of Interstate Commerce Commission. Twenty-eighth. Of cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission."

The Three Judge District Court erroneously disclaimed jurisdiction to set aside or annul the order of the Commission by sacrificing substance to form. Because the order of the Commission, in form, discontinued the proceeding, the Court erroneously concluded no order existed that could be set aside.

The opinion of the District Court illustrates the theory on which it proceeded, and as we contend, erroneously.

> "By its finding and determination with respect to the practice here involved, the Interstate Commerce Commission made no decision which required any party to the proceeding before it to do or not to do any specific act. It followed the directions of the Supreme Court (*General American Tank Car Corp. v. El Dorado Terminal Co.*, supra) *and determined, under the Interstate Commerce Act, the lawfulness and reasonableness of the practice which had obtained between plaintiff and the tank car company.* When this was done its job was done. It was not required to make any order and made none, and having completed its work, stamped 'finis' thereon and discontinued the proceeding." (R. 35.)

It is obvious that the Commission could not have performed its duty under Section 15 (13) of the Interstate Commerce Act as it was directed so to do by the Supreme Court in *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, if in fact the Commission made no order. If, however, the Commission, by its findings and order, passed upon the issues before the District Court in the original assumpsit

action, either judicially or in an advisory capacity, it usurped the jurisdiction of that Court. The order of the Commission, by whatever name it is designated, is in its nature an effort by the Commission to decide the controversy between appellants and the Car Company in the pending action of assumpsit.

The administrative action of the Commission is subject to judicial review unless it falls within an excepted classification. (*Eastern Central, etc. v. U. S.*, 321 U. S. 194, 88 L. Ed. 668; *St. Louis & O'Fallon R. Co. v. U. S.*, 279 U. S. 461, 73 L. Ed. 798.) Since the decision of this Court in *Rochester Telephone Corp. v. U. S.*, 307 U. S. 125, the basis of reviewability of administrative action has been concerned with the substance of what was done or sought to be done rather than with technical form. Similarly, in *Mitchell v. United States*, 313 U. S. 80, this Court said:

> "The fact that the Commission's order was one of dismissal of appellant's complaint did not foreclose the right of review. Appellant was an aggrieved party and the negative form of the order is not controlling." (p. 92.)

The cases relied upon by the lower Court and cited in its opinion as authority for its decree are premised upon the "negative order" doctrine that was set at rest by the decision in the case of *Rochester Telephone Corp. v. U. S.*, supra. The case of *United States v. Griffin*, 303 U. S. 226, relied upon by the lower Court, was decided upon the authority of *Procter & Gamble Co. v. U. S.*, 225 U. S. 282, which latter case was overruled and its "negative order" doctrine expressly

repudiated by *Rochester Telephone Corp. v. U. S.*, supra.

The other cases relied upon by the lower Court, e.g., *United States v. Illinois Cent. R. Co.*, 244 U. S. 82; *Delaware & Hudson R. Co. v. United States*, 266 U. S. 438, and *United States v. Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, involved orders of a preliminary or procedural character that in no sense purported to be final adjudications of substantive rights such as the order attacked here.

The reviewability of an order is not to be determined by its form. (*American Fed. of Labor v. National Labor Relations Board*, 308 U. S. 401, 408, 84 L. Ed. 347.) In *Mitchell v. U. S.*, 313 U. S. 80, the Supreme Court held that an order of dismissal, though negative in form, does not foreclose the right of judicial review. Again, in *Columbia Broadcasting System v. U. S.*, 316 U. S. 407, the Supreme Court announced that the label placed upon an order by the Commission is not conclusive and that an order that in effect penalizes or injures a party, is reviewable.

II.

THE INTERSTATE COMMERCE COMMISSION IN ITS ORDER FAILED AND REFUSED TO MAKE A PROPER INVESTIGATION UNDER SECTION 15 (13) OF THE INTERSTATE COMMERCE ACT AND ATTEMPTED AN UNLAWFUL EXERCISE OF AUTHORITY.

The proceeding before the Commission that culminated in the order under attack was instituted by the Commission on its own motion, following the filing of a petition by appellants, as a result of the decision of the Supreme Court in *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422. In that case, the Supreme Court directed the District Court before which the original assumpsit action was pending to stay its hand pending a determination by the Interstate Commerce Commission of the administrative question involved.

The Supreme Court in *General American Tank Car Corp. v. El Dorado Terminal Co.*, supra, upheld the validity of the car leasing agreement (the identical contract involved here) and held that the Oil Works (appellant here) having furnished the cars was therefore entitled under the "plain provisions of Section 15 (13)" to receive the compensation provided by the Act, but that as the published tariffs specified allowances would be paid only to the person whose reporting marks were on the cars, and the Oil Works, as lessee, did not have its reporting marks upon the cars, it was not entitled under the existing tariffs to demand the mileage allowances from the carriers. The Court also clearly indicated that there was no legal inhibition against making a profit and held that the Commission

is required to ascertain after a full investigation a fair and reasonable compensation and prescribe a uniform rate to be paid to the furnisher, whether owner or lessee, of a service or facility.

The Commission was therefore required to determine after investigation what is a just and reasonable allowance to be made by carriers to shippers or others furnishing facilities or services to the carriers which compensation must be just and reasonable, uniform as to all who furnish the services and embodied in the approved and published tariffs of the carriers. Section 15 (13) of the Interstate Commerce Act (49 U.S.C.)

The report and order of the Commission of April 10, 1944, not only failed to determine the administrative questions but assumed in excess of its constitutional and statutory authority to decide the civil action in assumpsit pending before the District Court.

The Commission did not determine as required under the provisions of Section 15 (13) of the Interstate Commerce Act what was a just and reasonable compensation to be paid by the carriers to the furnishers of tank cars uniformly as a class. Instead it deliberately avoided that subject with the statement "were we to attempt to determine the reasonableness of allowances for a 'class' of tank cars such as these, we cannot tell how far-reaching the investigation would have to be". (R. 249.)

The effect of the Commission's findings and order is to deny to appellants the right to recover under the

lease contract and to permit the Tank Car Corporation to retain the mileage which it had collected from the carriers as mileage allowances for the tank car facilities furnished by the appellants, notwithstanding the provisions of the statute that such allowances could be paid to and were only authorized for the benefit of the furnishers of the facilities.

The Commission by its order assumed that its decision was ancillary to the pending assumpsit action and that it "authoritatively" determined the amount of the allowance payable to the shipper (appellants) in that action. This was an unconstitutional assumption of authority on the part of the Commission and in excess of the authority conferred by Section 15 (13) of the Interstate Commerce Act. (*Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U. S. 285; *Ellis v. I.C.C.*, 237 U. S. 434.)

The Supreme Court in *General American Tank Car Corp. v. El Dorado*, supra, held that the District Court had jurisdiction of the assumpsit action, but that decision did not assume to either enlarge or reduce the statutory duty of the Commission.

The order of the Commission having failed to establish just and reasonable compensation to be allowed uniformly to furnishers of tank cars as a class and being solely designed to "authoritatively" decide the pending assumpsit action, should be set aside and annulled.

The order of the Commission, if permitted to stand, would render the carriers unable to establish and

publish a uniform allowance as contemplated by Section 15 (13). The payment by the carriers of variable rentals would be in violation of Section 2 of the Interstate Commerce Act. This would impose the burden on the carriers to determine in each instance the amount paid or payable by a shipper-lessee for each tank car furnished the carriers and be not only an insuperable burden for the carriers but would open the door for the preferences and discriminations prohibited by the Interstate Commerce Act.

III.

THE COMMISSION'S CONCLUSION THAT AN ALLOWANCE TO THE OIL WORKS BY THE RAIL CARRIERS OR BY THE TANK CAR COMPANY UNDER THE AGREEMENT IN EXCESS OF THE CAR RENTALS WOULD BE UNJUST AND UNREASONABLE AND WOULD UNDULY PREFER THE OIL WORKS AS A SHIPPER OF ITS COMMODITIES WAS ENTIRELY WITHOUT SUPPORT IN THE EVIDENCE AND WAS ARBITRARY.

The evidence shows without conflict that on all movements of the leased cars the carriers had received the full freight to which they were entitled under the applicable tariffs. The uncontradicted evidence shows that the freight was paid by the consignees, hence no rebate in freight could have been received by the Oil Works. (R. 122.)

This Court has consistently adhered to the rule that a finding unsupported by any evidence or contrary to the evidence is arbitrary and baseless. (*Interstate*

Commerce Commission v. Louisville & Nashville R. Co., 227 U. S. 88; *Ohio Bell Tel. Co. v. Public Utilities Com.*, 301 U. S. 292, 81 L. Ed. 1093.)

CONCLUSION.

The final decree of the Three Judge District Court is contrary to the express provisions of the Urgent Deficiencies Act and the decisions of this Court and should be reversed with directions to annul and set aside the order of the Interstate Commerce Commission of April 10, 1944.

Dated, San Francisco, California,
January 16, 1946.

Respectfully submitted,
W. F. WILLIAMSON,
Counsel for Appellants.

WILLIAM B. MEAD,
WILLIAMSON & WALLACE,
Of Counsel.

(Appendix Follows.)

Appendix

Interstate Commerce Act, Section 15-(13):

"If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section." Act of June 29, 1906, 34 Stat. 590, c. 3591, as amended by Act of June 18, 1910, 36 Stat. 553, c. 309, and by Act of Feb. 28, 1920, 41 Stat. 488, c. 91; 49 U.S.C. Section 15 (13).

APPELLANT'S REPLY BRIEF

FILE COPY

In the Supreme Court

OF THE

United States

Supreme Court, U. S.
FILED
MAR 16 1946
CHARLES ELMORE CROPLEY

OCTOBER TERM, 1945

No. 428

EL DORADO OIL COMPANY AND EL DORADO TERMINAL COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL AMERICAN TRANSPORTATION COMPANY, et al.,

Appellees.

Appeal from the District Court of the United States for the Northern District of California.

APPELLANTS' REPLY BRIEF.

W. F. WILLIAMSON,
310 Sansome Street, San Francisco 4, California,
Counsel for Appellants.

WILLIAM B. MEAD,
WILLIAMSON & WALLACE,
310 Sansome Street, San Francisco 4, California,
Of Counsel.

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F. The finding (R. 250) that the amount paid by the car company to the oil works prior to July 1, 1934 under the terms of the agreement, to the extent that it was in excess of the rentals due thereunder, was unjust and unreasonable and unduly preferred the oil works as a shipper of its commodities, is not only wholly without supporting evidence in the record, for reasons heretofore stated, but such finding was beyond the statutory authority or jurisdiction of the Commission 23

G. The Commission's findings and order that the maximum compensation to be paid by the carriers should not exceed the car rental paid by the shippers stems from an erroneous view of the law and in effect imposes upon the carriers the responsibility of determining the car rental paid by a shipper for each car furnished to the carriers. This precludes a uniform allowance and the disclosure thereof in the published tariffs as required by Section 15(13) of the Commerce Act 32

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In the Supreme Court
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Appellants,
vs.
THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL AMERICAN TRANSPORTATION COMPANY, et al.,
Appellees.

Appeal from the District Court of the United States for the Northern District of California.

APPELLANTS' REPLY BRIEF.

INTRODUCTORY.

This brief is presented in behalf of appellants, El Dorado Oil Works and El Dorado Terminal Company, upon the merits pursuant to the directions of this Court following the argument as to Jurisdiction on January 29, 1946.

OPINIONS BELOW.

The opinion of the specially constituted District Court (R. 33) is reported in 59 F. Supp. 738.

The report of the Interstate Commerce Commission is reported in 258 I.C.C. 371.

JURISDICTION.

1. The final decree of the Three Judge District Court organized pursuant to the Urgent Deficiencies Act (38 Stat. 219; 28 U.S.C. Secs. 41 (28) and 43-46, inclusive) was entered on April 9, 1945.

2. The petition for appeal was presented to and allowed by the said District Court on June 1, 1945. The record on appeal was filed within the time allowed by law. (R. 42, 43.)

3. The jurisdiction of this Court is invoked under Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, par. (4); U.S.C., Title 28, Sec. 345) and Section 210 of the Judicial Code. (38 Stat. 220, 28 U.S.C. 47a.)

4. This Court on October 15, 1945, entered its order noting probable jurisdiction and transferring the case to the summary docket. (R. 267.)

5. Following the hearing of this cause on January 29, 1946, this Court ordered the cause set down for argument on the merits for March 25, 1946.

STATUTES INVOLVED.

Section 15(13) of the Interstate Commerce Act (49 U.S.C. 15(13));

Elkins Act (49 U.S.C. 41(1)(2)).

STATEMENT OF THE CASE.

This action was instituted by Appellants (Plaintiffs below) under the Urgent Deficiencies Act to annul and set aside an order of the Interstate Commerce Commission dated April 10, 1944, in a proceeding entitled "Allowances for Privately Owned Tank Cars". (258 I.C.C. 371.) The complaint charged that the Commission was without constitutional authority to proceed as it did; that it exceeded its statutory authority and did not comply with the plain provisions of Section 15(13) of the Interstate Commerce Act (Appendix A); that its findings and decisions were not supported by the prerequisites of proof and that there was no evidence whatever to support its decision. (R. 1-5.) The United States, the Interstate Commerce Commission, General American Transportation Corporation and some eighty-eight (88) railroads filed answers. (R. 6, 11, 22, 29.) Thereafter, the Three Judge District Court rendered an opinion declaring that the Court would not pass upon the merits of the case because it lacked jurisdiction of the subject matter. The opinion further stated that the Interstate Commerce Commission in its action had followed the directions of the Supreme Court in its

decision in the case of *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422. (R. 35.) Following this opinion, findings and conclusions were filed and a final decree was entered on April 9, 1945, denying to the Appellants the relief prayed for and dismissing the action for want of jurisdiction. (R. 40-41.) The present appeal is from that judgment. The jurisdiction of this Court to hear the appeal was challenged by Appellees' motion to affirm without argument, which has heretofore been argued and determined. The case is at present before this Court on the merits.

Inasmuch as the arguments advanced by Appellees and Intervenors in their briefs heretofore filed have covered the earlier action in assumpsit filed in the District Court for the Northern District of California, Southern Division, and the progress of that case through the courts until it culminated in the decision of this Court reported in 308 U.S. 422, a statement of the case and its history is in order.

The Appellant, El Dorado Oil Works, was prior to the year 1933 and since engaged in the extraction of cocoanut oil from copra in plants at Berkeley and Oakland, California. On September 28, 1933, it entered into an agreement with General American Tank Car Corporation, predecessor of General American Transportation Company, intervenor in this action, under which the Tank Car Corporation, which for convenience will be referred to as the "Car Company," leased to the Oil Works 50 tank cars of the size and type required by the Oil Works, at a monthly

rental of $27.50 per car. (R. 52-54.) The Oil Works also agreed to take, and the Car Company further agreed to supply the Oil Works with, such additional tank cars as it might require at a monthly rental of $30.00 per car. (R. 54-56.) Under the agreement the Oil Works was permitted to use the cars for the transportation of its cocoanut oil within the United States. It routed the cars according to the requirements of its business over the lines of transcontinental and other interstate carriers. The agreement required the Car Company to collect the mileage earned, under the applicable railroad tariffs, by such use of the leased cars and to credit to the Oil Works monthly the mileage so earned. (R. 52, 55, 56.) Similar lease contracts had been in effect between the Oil Works and the Car Company over a period of years and in practice the Car Company paid monthly to the Oil Works the monies so received from the carriers as mileage earned by the movement of the cars after deducting current car rentals due or accrued. This practice was continued until July, 1934. Thereby the Car Company had accounted for and paid to the Oil Works the mileage allowance earned by the use of the leased tank cars for the first five months of the leasehold period beginning January, 1934, and including December, 1936. In July, 1934, and thereafter, the Car Company refused to pay to the Oil Works any part of the mileage allowance so collected by it for the use of the tank cars so furnished by the Oil Works in excess of the monthly rental reserved in the lease agreement, although the Car Company continued to receive and retain the full mileage allowance of one

and one-half cents per car mile provided to be pai in the published tariffs of the carriers.

In June, 1935, the El Dorado Terminal Company a wholly owned subsidiary of the El Dorado Oi Works, brought suit as assignee against the Car Com pany in the United States District Court for th Northern District of California, Southern Division to recover the amount of mileage so collected by th Car Company and retained by it for the furnishin by the Oil Works of the leased tank cars up to Ma 31, 1935. (R. 43-49.) In its answer to said complain the Car Company admitted and pleaded the car leas agreement of September 28, 1933. It also admitte its receipt and retention of the sum of $18,532.78 fro the carriers as mileage for the use of said leased ca but denied liability on the sole ground that the pay ment of said sum to the Oil Works as provided in th car lease agreement was expressly prohibited by th provisions of the Elkins Act and that such paymen by the Car Company would be unlawful in that th Oil Works would by such payment obtain a rebate o concession in violation of the provisions of the Elkin Act. Following a trial, the United States Distric Court rendered judgment for the Car Company with out opinion or findings. The Circuit Court of Appeal for the Ninth Circuit reversed the District Court an ordered judgment for the Oil Works for the fu amount so claimed. Certiorari was granted by th Court on the petition of the Car Company and th Interstate Commerce Commission. (R. 49-50.) In a opinion delivered January 2, 1940, this Court gene

ally followed and approved the reasoning of the Circuit Court of Appeals but held that where questions within the administrative jurisdiction of the Interstate Commerce Commission were presented, the District Court should have stayed its hand until such questions could be passed upon by the Commission. (308 U.S. 422.) The construction to be placed upon that decision was the subject of controversial discussion in the Lower Court and again in the briefs filed in this case. No action was taken following the decision, either by the Interstate Commerce Commission or the Car Company. The Oil Works, however, petitioned the Commission for an investigation and to make such order or orders as the Commission might consider proper in the premises. (R. 50-51.) The Commission appointed an examiner who took testimony and the matter was argued before the Commission on November 5, 1941. The report of the Commission, consisting of findings and an order of dismissal, was filed on April 10, 1944. (R. 237.) In due time and after petition for rehearing and reconsideration had been filed by the Oil Works and denied, the present action was instituted in the District Court for the Northern District of California, Southern Division, and a Three Judge Court was constituted consisting of a Circuit Judge and two District Judges. From the final decree of the Three Judge District Court dismissing the action, the present appeal was taken. In its statement of points on which Appellants intend to rely on this appeal (filed September 26, 1945), Appellants assigned the following:

(a) That the Commission, contrary to the provisions of Section 15(13) of the Commerce Act, failed and refused to make a proper investigation or establish a uniform and reasonable allowance to be paid in the future by carriers to the furnishers of tank cars;

(b) Contrary to the provisions of Section 15(13) of the Commerce Act, the findings and order of the Commission sanctioned the payment of a higher mileage allowance by the carriers to an owner of tank cars who had not furnished the cars than that determined by the Commission in the same order to be the maximum allowance to be paid to the furnishers of such cars;

(c) The finding of the Commission, which was incorporated by reference in the Commission's order, that an allowance to the Oil Works by the carriers or the Car Company under the car lease agreement in excess of the car rentals would be unjust and unreasonable and would unduly prefer the Oil Works as a shipper, was entirely without support in the evidence and was arbitrary and contrary to law;

(d) The findings of the Commission that the amount paid by the Car Company to the Oil Works prior to July 1, 1934, under the terms of the car leasing agreement, to the extent that it exceeded the car rentals, was unjust and unreasonable and unduly preferred the Oil Works as a shipper, was not supported by any evidence and was contrary to all of the evidence in the record and, therefore, was arbitrary;

(e) The finding that if, in accordance with the car leasing agreement the Oil Works was paid the car

mileage collected by the Car Company from the carriers, the Oil Works would thereby obtain the transportation of the commodity shipped by it in interstate commerce at a lower cost than others who used cars assigned to them by the carriers, or who owned their own cars, was unsupported by the evidence and there was no evidence whatever as to the relative costs of furnishing tank cars by carriers or car owners, as distinguished from car renters, and no evidence that any car owners furnished tank cars to the carriers for transportation purposes or that the carriers furnished such cars to the shippers for the transportation of their commodities;

(f) The finding that a reasonable allowance "has been made to the Oil Works through credits made * * * by the Tank Car Corporation" was contrary to the evidence and in excess of the authority of the Commission and, in effect, a decision of the issues before the District Court in the original assumpsit action. In so holding the Commission erroneously usurped the function of the District Court before which the action in assumpsit is pending;

(g) The Commission's findings and order that the maximum compensation to be paid by the carriers should not exceed the car rentals paid by the shippers stems from an erroneous view of the law and, in effect, imposes upon the carriers the responsibility of determining the car rental paid by a shipper for each car furnished by him to the carriers. This precludes a uniform allowance and the disclosure thereof in the published tariffs, as required by Section 15(13) of the Commerce Act.

ARGUMENT.

A. THE COMMISSION FAILED AND REFUSED TO MAKE THE INVESTIGATION AND TO DETERMINE WHAT IS A REASONABLE ALLOWANCE TO BE PAID BY CARRIERS FOR THE FURNISHING OF TANK CARS FOR THE CARRIERS' USE.

As declared by this Court in its decision of *General American Tank Car Corp. v. El Dorado Terminal Co.*, supra, a shipper furnishing tank cars or other facilities used by the carriers is entitled to receive from the carriers compensation that is just and reasonable, which compensation must be determined by the Commission after investigation as provided in Section 15(13) of the Interstate Commerce Act. There is no other statutory authority for such action. If the owner of property transported shall furnish the facility used or render the service, he is entitled under the plain provisions of this section to receive the compensation when and as so determined. This is clear not only under the language of the section, but also under the language of this Court in its decision of the *General American Tank Car Corp.* case, supra. Action on the part of the Commission may be brought about on a complaint to the Commission or on its own initiative. In the present controversy, the Appellants petitioned the Commission for action under this section. The Commission granted the said petition but also ordered upon its own motion the investigation which resulted in the decision and order under attack in the present suit. (R. 58.) The Appellants in petitioning for the investigation were not complainants. They did not charge discrimination or undue preferences of any kind nor did they charge rebates or

claim against carriers for reparation or for the payment by the carriers of the mileage allowance. They merely filed a petition to initiate the investigation and determination contemplated by the statute and indicated by the decision of this Court as necessary or proper in the circumstances of the case. Under the language of the statute the investigation was to be the same whether it was initiated by a complaining shipper or by the Commission on its own initiative. It is an admitted fact, and so held by this Court in its opinion and recognized by the Commission in its decision, that during the period covered by the present controversy the mileage allowance of one and one-half cents per car mile, loaded and empty, had been provided for in the approved and published tariffs of the railroad carriers. This Court also held that the carriers' tariffs during the same period contained a provision that the mileage allowance would be paid to the registered car owner and not to a shipper lessee. While the tariff containing this restriction was in effect, the carriers could not have lawfully paid the mileage allowance to Appellants as shippers, but, as to that matter, this Court held that, having furnished the tank cars, Appellants, as shippers, were entitled to the mileage allowance under the plain provisions of Section 15(13), and that the restrictions referred to must give way before the definite language of the statute. In the investigation referred to, the Commission could not, even if application had been made therefor, require the carriers to pay the mileage allowance to Appellants in contravention of the approved and published tariffs nor could the Commis-

sion have obviated the provisions of the tariffs that had been in effect for many years. All that the Commission could do under the cited section either on complaint or on its own initiative was to determine a reasonable charge as a maximum to be paid by the carriers for the instrumentality furnished and fix the same by an appropriate order. The order so made and the tariffs so approved could only be effective in the future. The language of the statute would clearly indicate this as did this Court at pages 431 and 432 of its decision in the *General American Tank Car Corp.* case, supra. It therefore devolved upon the Commission to make a full investigation of the furnishing of tank cars either by owners or shippers as a class and to determine a rate for such service that would be just and reasonable in the light of all of the facts so ascertained. It as disclosed in the case before the Court, the effective mileage allowance would in some cases yield a profit to the shipper, that was a matter to be considered by the Commission in determining a just and reasonable allowance. As to the past, the allowance was definite and effective under the published tariffs; but as to the future, it was open to determination by the Commission in the light of all facts discovered upon investigation, including the fact that some shippers might profit while others might not. The Commission did not make such an investigation. It investigated the course of dealing over the years between the Car Company and the Oil Works. In so doing, the Commission failed to perform the duty devolving upon it under Section 15(13) of the Act as construed by this Court in its decision in the

General American Tank Car Corp. case, supra. In applying the provisions of Section 15(13) of the Act to the present case, this Court said at page 430:

> "The Commission is compelled to ascertain in the light of past and present experience a fair and reasonable compensation to cover such costs and prescribe a uniform rate which will reflect such experience."

The Commission deliberately failed to do this and justified its failure with the statement:

> "Were we to attempt to determine the reasonableness of allowance for a 'class' of tank cars such as these, we cannot tell how far reaching the investigation would have to be." (R. 249.)

We submit the action of the Commission was arbitrary and reflects an erroneous view of the law.

B. IN SANCTIONING THE PAYMENT BY THE CARRIERS TO THE CAR COMPANY THAT DID NOT FURNISH THE TANK CARS OF A MILEAGE ALLOWANCE IN EXCESS OF THE CAR RENTALS PAID BY THE OIL WORKS, THE COMMISSION EXCEEDED ITS AUTHORITY AND VIOLATED THE DUTY IMPOSED UPON IT BY SECTION 15(13) OF THE COMMERCE ACT.

In its decision and under the admitted facts, the Commission held that the Oil Works, as shipper-lessee, had furnished the tank cars as instrumentalities for the use of the carriers. The Commission expressly held that the mileage allowance exceeded the car rentals payable by the Oil Works under the car lease agreement. (R. 242.) The Commission also de-

cided that the just and reasonable allowance as a maximum to have been paid by the rail carriers to the Oil Works for the furnishing of such cars would have been an amount not to exceed the car rental. (R. 242.) In holding that the Oil Works is not entitled to claim from the Car Company the overage above the car rentals, the Commission in effect, if not in terms, sanctioned the payment by the carriers to the Car Company (though it did not furnish the cars) of an amount as compensation for the cars furnished by the Oil Works in excess of the allowance which in the same order the Commission had determined was the maximum that could be paid by the carriers for the service. This finding was in excess of the Commission's authority under Section 15(13) of the Act: First, because it sanctioned a payment to one who had not furnished the service; and Second, because it sanctioned the payment of an amount in excess of that which the Commission had determined in the same order could be made as a maximum to one who did furnish the service. This action of the Commission clearly proceeded from an erroneous view of the law. Under the provisions of Section 15(13) of the Act a compensatory allowance for the furnishing of a service or instrumentality was only permitted to be paid to the person so furnishing the service. If the car rental was the maximum permissible payment the or any payment to the car company in excess of the car rental was unlawful.

C. THE DECISION OF THE COMMISSION THAT AN ALLOWANCE TO THE OIL WORKS BY THE CARRIERS OR THE CAR COMPANY UNDER THE CAR LEASE AGREEMENT IN EXCESS OF THE CAR RENTALS PAYABLE UNDER THE AGREEMENT WOULD BE UNJUST AND UNREASONABLE AND WOULD UNDULY PREFER THE OIL WORKS AS A SHIPPER, WAS ENTIRELY WITHOUT SUPPORT IN THE EVIDENCE AND WAS ARBITRARY AND CONTRARY TO LAW.

If the finding is to be understood as applicable to the future only, it is purely speculative. Conditions under which the payment would be unjust or unreasonable or unduly preferential could not arise until the stipulated payments had been made. Whether the payments agreed upon would produce any of the results prohibited by the law must of necessity depend upon what should transpire after the payments were made. The finding was therefore a mere assumption and arbitrary. In reaching its decision, the Commission evidently relied upon two circumstances. One was that the Appellants had realized a profit above the car rentals for the period during which the Car Company had paid over the mileage collected by it as Appellants' agent under the terms of the car lease agreement. The profit so realized was not a rebate nor do the Appellees make that claim. This Court in its opinion in *General American Tank Car Corp. v. El Dorado Terminal Co.* and also in *Interstate Commerce Commission v. Diffenbaugh*, 222 U.S. 42, and the Commission itself in its order in *In re Private Cars* (50 Interstate Commerce Commission Report 652), recognized that the realization of such profit was not unlawful. No prohibited rebate or preference can be properly inferred from the profit alone because the

payment of the car rental would result in a continuous loss to the car renter if by reason of strikes or world war conditions he was unable to make oil shipments in the leased cars. The Commission also apparently relied upon its report in the *Refrigerator Car* case (201 I.C.C. 323), and counsel for Appellees have endeavored to defend the Commission's action on the authority of that report. That report was not substantial or any evidence as to the facts in the investigation under review in this action. In its decision in the *Refrigerator Car* case, the Commission pointed out the difference in the matter of supply and demand between the use of refrigerator cars and tank cars, and held that the evidence in that proceeding was insufficient to justify findings as to whether the abuses found to exist as to refrigerator cars attended the use of tank cars. (R. 247-8.) For that reason the order was expressly limited to refrigerator cars. There was no additional evidence before the Commission on the investigation under attack and therefore neither the report in the *Refrigerator Car* case nor the evidence before the Commission upon which that report was based was evidence on this investigation that payments by the Car Company in accordance with the car lease agreement in excess of the car rentals would be unjust or unreasonable or unduly prefer the Oil Works as a shipper. In *Erie R. Co., et al. v. United States*, decided March 24, 1944, the Three Judge Court sitting in the District Court of the United States for the Southern District of Ohio, Eastern Division, set aside an order of the Commission which was based upon a former decision of the Commission without other

facts or evidence. The present is a replica of that case and justifies Appellants' position that the order of April 10, 1944, should be set aside and annulled.

D. THE COMMISSION'S DECISION (R. 250) THAT THE AMOUNT PAID BY THE CAR COMPANY TO THE OIL WORKS PRIOR TO JULY 1, 1934, UNDER THE TERMS OF THE AGREEMENT, TO THE EXTENT IT WAS IN EXCESS OF THE CAR RENTAL DUE THEREUNDER, WAS UNJUST AND UNREASONABLE AND UNDULY PREFERRED THE OIL WORKS AS A SHIPPER OF ITS COMMODITIES, WAS NOT SUPPORTED BY ANY EVIDENCE BUT WAS CONTRARY TO ALL OF THE EVIDENCE IN THE RECORD.

Viewing this decision as referring to payments in the past as distinguished from those to be paid in the future under the contract, the evidence shows that the Oil Works sold its oil at a price f.o.b. its plant on San Francisco Bay. It was never called upon to pay nor did it pay the freight on its shipments of the tank cars. The cars were shipped on order ladings with draft attached for the agreed purchase price. Ladings and drafts were forwarded to a bank for collection. The consignee upon taking up the drafts secured possession of the commodity shipped upon paying the freight charges. In every instance, the consignee had paid the full tariff rate. He had no relation with the carrier except such payment. There was no relation between the Oil Works as shipper and the carrier except delivery of the loaded cars for transportation. The only payment by the carriers was the amount of mileage stated in the tariffs. This payment was made to the Car Company and not the shipper because of

restrictive provisions in those tariffs. There was no evidence of an understanding or agreement between the carrier and the Car Company as to the disposition by the Car Company of the mileage received by it, and there was no evidence that the receipt by the Oil Works of the earned mileage from the Car Company in accordance with the car lease agreement constituted a preference of the Oil Works as a shipper over other shippers or other renters or users of cars. The effect of such payment was to merely reduce the rentals paid for the use of the cars under the car lease agreement. Except that the Oil Works showed that it paid a substantial amount for the cleaning and preparation of each tank car before putting it in use, this was all the evidence before the Commission as to the operation of the car lease agreement between the Oil Works and the Car Company. That evidence does not show that in such past dealings the Oil Works by the receipt of the agreed mileage payments from the Car Company received a rebate or a preference as a shipper or that such payments were unjust or unreasonable. The finding is arbitrary and without support in the evidence. This Court has consistently adhered to the rule that a finding unsupported by evidence or contrary to the evidence is arbitrary and should be annulled. (*Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U.S. 88; *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292.)

The Elkins Act prohibits the transportation by common carrier of property at a less rate than that published and applicable under the tariff. It also

prohibits a resort to any device whereby a shipper knowingly solicits, accepts or receives a concession or discrimination in respect to transportation. (Sec. 41, Title 49, U.S.C.A.) Following this section the courts have held that there could be no violation of the provisions of the Elkins Act where there was strict adherence to the published tariffs. (*U. S. v. Durkee Famous Foods, Inc.*, 17 Fed. Supp. 846.)

Counsel for the Appellee, General American Transportation Company, take issue with the foregoing claims of Appellants and at pages 20 and 21 cite authority which they assert sustains their view. In the cited case, *Northern Central Ry. Co. v. United States*, the defendant, an interstate railroad carrier, leased mining property owned by it to a mining company on a royalty basis. The coal produced was shipped over the line of the defendant carrier, and in consideration thereof the carrier remitted the royalty. This was held a rebate or concession.

In *Elgin J. & E. Railway Co. v. U. S.*, also cited by Appellee, the railroad company, by false billing, assisted a shipper to obtain transportation at less than the usual rates. An indictment alleging the facts as above was held sufficient, although it failed to allege that the shipper actually paid the freight, because the false billing, with its subsequent assistance to the shipper, constituted the offense.

Ohio Tank Car Co. v. Keith Railway Equipment Co. is equally without point. That case involved an arrangement whereby a shipper received the benefit of a concession in freight charges through payments

made to its wholly-owned subsidiary where the officers, directors and stock owners of both companies were the same. It was apparently a device whereby the rebate or concession was granted and received indirectly. There was no such condition in the instant case. There was no evidence, nor has it been claimed at any time in this Court, before the Commission or in the lower Court, that the car-leasing agreement was used as a cloak to conceal any rebate or concession.

Appellee's counsel have evidently overlooked the admitted facts above mentioned in further citing *Interstate Commerce Commission v. Reichmann* and *Spencer-Kellogg & Sons v. U. S.* The issue before the Court in the *Reichmann* case was the power of the Commission, on examining a witness who was president of a private car company, as to his agreement with a car user in respect of beneficial allowances inducing the shipper's action in transportation. Under the language of the Elkins Act, the questions were proper and should have been answered, and that was the only question before the Court. Judge Landis, however, took advantage of the opportunity afforded by the case to make an extended analysis of the Elkins Act, which had been recently passed. We may concede what the Court so decided in 1906, but it does not touch the present case at any point.

In the *Spencer-Kellogg* case the elevator company was convicted of giving a rebate or concession in respect to transportation in interstate commerce. It was the operator of a grain elevator at Buffalo. Shipments of grain from the Middle West through the

Lakes passed through Buffalo eastbound on a through rate which included a charge by the elevator company for elevating, storing for a limited time and reloading the grain for transportation to seaboard. The allowance for this service was included in the through tariffs, and the elevator company, to induce the shipment of grain through its elevator, refunded a portion of the compensation which it had received for transportation. Appellees apparently believe that this case supports their claim that a rebate or concession prohibited under the Elkins Act may be accomplished without the intervention of a carrier. The perfect answer to that contention is found in the closing paragraph of the opinion of the Circuit Court of Appeals in the cited case, where the Court, in sustaining the conviction, said:

> "The penalty is imposed here not because it was acting for the carrier but because it performed a service of transportation and gave a rebate to its shipper or consignee from the compensation received for that part which it performed."

E. THE DECISION ON THE PURPORTED AUTHORITY OF THE COMMISSION'S ORDER IN THE REFRIGERATOR CAR CASE THAT IF IN ACCORDANCE WITH THE CAR LEASING AGREEMENT THE OIL WORKS WAS PAID THE CAR MILEAGE COLLECTED BY THE CAR COMPANY FROM THE CARRIERS, THE OIL WORKS WOULD THEREBY OBTAIN THE TRANSPORTATION OF COMMODITIES SHIPPED BY IT AT A LOWER COST THAN OTHERS WHO USED CARS ASSIGNED TO THEM BY THE CARRIERS OR WHO OWNED THEIR OWN CARS, WAS WHOLLY UNSUPPORTED BY THE EVIDENCE, AND THERE WAS NO EVIDENCE WHATEVER AS TO THE RELATIVE COST OF FURNISHING TANK CARS BY CARRIERS OR CAR OWNERS AS DISTINGUISHED FROM CAR RENTERS, AND NO EVIDENCE THAT ANY CAR OWNERS FURNISHED TANK CARS TO THE CARRIERS FOR TRANSPORTATION PURPOSES OR THAT THE CARRIERS FURNISHED SUCH CARS TO SHIPPERS FOR THE TRANSPORTATION OF THEIR COMMODITIES.

The first proposition—that is to say, that the Oil Works would, in the event of such payment, obtain transportation of its commodity at a favorable rate, is sufficiently answered by our observations in the two preceding paragraphs. Our contention as to the absence of any evidence on the relative cost of furnishing cars by carriers or car owners, as distinguished from car renters, finds support in the printed record of the evidence taken during the investigation. This evidence is found at pages 61-236, both inclusive. It is significant that although this point was advanced in the earlier brief filed by Appellants in this Court, counsel for the Appellees have cited no evidence to sustain the decision. On the other hand, the Commission's statements at page 248 of the record, explaining its failure to investigate beyond the dealings between the Oil Works and the Car Company, supports our challenge to this finding. The rule that the deci-

sion and order of the Commission will be annulled in the absence of any evidence to support it is so well established and universally recognized that we do not feel called upon to again cite authority to sustain our contention.

F. THE FINDING (R. 250) THAT THE AMOUNT PAID BY THE CAR COMPANY TO THE OIL WORKS PRIOR TO JULY 1, 1934 UNDER THE TERMS OF THE AGREEMENT, TO THE EXTENT THAT IT WAS IN EXCESS OF THE RENTALS DUE THEREUNDER, WAS UNJUST AND UNREASONABLE AND UNDULY PREFERRED THE OIL WORKS AS A SHIPPER OF ITS COMMODITIES, IS NOT ONLY WHOLLY WITHOUT SUPPORTING EVIDENCE IN THE RECORD, FOR REASONS HERETOFORE STATED, BUT SUCH FINDING WAS BEYOND THE STATUTORY AUTHORITY OR JURISDICTION OF THE COMMISSION.

The distinction between the authority of the Commission on the one hand and that of the Courts on the other was clearly stated by this Court in its decision in the case of *Great Northern Railway v. Merchants Elevator Co.*, 259 U.S. 285. This Court there pointed out the difference between questions of law as to the force of a statute or the construction of the tariff and questions as to technical matters involved in the framing of tariffs or rules. Questions of the first type were held to be subject to determination by the Courts. Specifically, the Court said:

> "To determine what rate; rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by exaction of an unreasonable or discriminatory rate is a judicial function."

The finding in question dealt only with the matter of previous payments of the Car Company under the car lease agreement, and the Commission held that such payments were unjust and unreasonable and, in effect, therefore unlawful to the extent that they exceeded the car rentals due under the contract.

Under the rule announced in *Great Northern Railway v. Merchants Elevator Co.*, supra, this was a question peculiarly within the jurisdiction of the courts and not within the authority of the Commission.

It would seem very clear that the Commission, in the finding referred to, took an erroneous view of the law and usurped the province of the Courts, whether it intended to hold that the payments referred to were made in violation of the applicable tariffs or any provision of the Interstate Commerce Act. In the recent case of *Perkins v. Elg*, 307 U.S. 325, this Court, following previous decisions, held that an administrative order based upon an erroneous rule of law should be set aside on that ground.

With probable reference to this contention of Appellants, counsel for the United States and the Interstate Commerce Commission, in their brief heretofore filed, assert (p. 31) that the assumpsit action involved only claims relating to the past and that this Court would not have stayed the hand of the District Court unless the Court had decided Section 15(13) of the Commerce Act gave the Commission power over past allowances. The statement that the assumpsit action involved only claims relating to the past was not en-

tirely correct. The payments referred to in the finding under examination had already been made under the terms of the contract, and the Appellants were merely seeking recovery of monies received by the Car Company as mileage earned by Appellants' tank cars and retained by the Car Company in breach of its agreement. Our construction of the provisions of Section 15(13) of the Act precludes a conclusion that the Commission had any authority under that section to determine the validity of past transactions but was authorized only, after investigation, to determine a just and reasonable allowance to be applicable for the future and to be published anew in the appropriate tariffs. We cannot agree that this Court intended to repudiate or overrule its decision in *Great Northern Railway v. Merchants Elevator Company*, supra, without even referring to the case. Nor can we assume that the Commission intended to condemn the practice of renting cars by a shipper or the payment of a mileage allowance that had been in effect and in the published tariffs for a great many years, especially in view of the statement by this Court in its opinion in *General American Tank Car Corp. v. El Dorado Terminal Co.*, supra, that such practice and such allowances were lawful and had been so recognized by the Commission.

In their briefs heretofore filed in this Court and in argument upon the question of jurisdiction, counsel for Appellees have attempted to justify the action of the Commission on the plea that authority for such action was given to the Commission by this Court in deciding *General American Tank Car Corp. v. El Dorado Terminal Co.*, supra.

In their answer to the complaint in the Lower Court, Appellees alleged that the Commission's report "does nothing more than to make certain administrative findings upon certain questions involved in a suit of law now pending before this Court, regularly constituted as a District Court of one judge, in which plaintiffs seek to recover certain sums of money". (R. 11 and 14.) The necessary theory of the pleading and the argument of counsel for the Appellees is that this Court in its former decision authorized the Commission to decide some at least of the issues in the assumpsit action. No such authority is vested in the Commission by the Constitution and Section 15(13) of the Interstate Commerce Act defining the authority of the Commission in matters of this character gives no such or any authority to the Commission in respect to issues in a civil action. We do not believe that this Court in the decision referred to intended to either broaden or narrow the authority of the Commission as expressed in the section of the act or to give to the Commission any authority over civil actions.

In its former decision (308 U.S. 422) this Court, after stating all of the pertinent facts, held that the Oil Works, and not the Car Company, had furnished the tank cars to the carriers for transportation purposes; that the one and one-half cent per mile allowance for said service appeared in the carriers' published tariffs and would remain the legal rate payable for the use of such cars until action by the Commission, and that the car lease agreement constituted the Car Company a mere agent for the collection and payment of the mileage allowance. (308 U.S. 427.)

Continuing, this Court said that the renting of cars by shippers and the furnishing of them to carriers was entirely lawful and had been so held by the Commission (Id. 429); that the requirements of paragraph 13 of Section 15 of the Commerce Act governed the payment of allowances for private cars and vested the Commission with authority to find and declare what allowances are reasonable; that the Commission is compelled, under the statute, to ascertain, in the light of past and present experience, a fair and reasonable compensation to cover such costs and prescribe a uniform rate which will reflect such experience. (Id. 430.)

From the foregoing the Court deduced and announced the rule that the shipper in this case (Appellants) was entitled to be paid a reasonable allowance to be set forth in the published tariff, failing which the shipper may complain to the Commission to the end that such allowance may be made effective by a schedule duly published. (Id. 430.)

Continuing, the Court observed that since the published tariffs then in effect required that the mileage allowance should be paid according to "so-called reporting marks" and to the car owner, as distinguished from the car lessee, direct payment to the lessee shippers could not be made under the tariffs, but that the shipper lessees (Appellants) were entitled to be paid by the carrier a just and reasonable allowance for providing the tank cars, and that "no rule or regulation of the carrier may provide for the payment of such allowance to any other person."

Commenting upon the admitted fact that the shipper lessee was making a substantial profit on the leased cars, the Court observed that the Commission has jurisdiction of that matter and if it should appear that the shipper lessee is so profiting, "it might, in the light of all the facts, be found that the shipper is in the result obtaining transportation at a lower cost than others for the use of cars assigned by the carriers or on their own cars." (Id. 431.)

The decision then concluded with the statement that when it appeared in the course of the litigation that an administrative problem committed to the Commission was involved, the Court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act.

In light of its above-mentioned statements, this Court did not directly, or by inference, commit to the Interstate Commerce Commission the decision of the issues involved in the original assumpsit action; nor did it specifically point to the administrative questions open to the decision of the Commission.

Having determined that the car lease agreement was lawful, that the Car Company was a mere agent under the terms of that agreement to collect and pay over the mileage allowance, that Appellants had furnished the tank cars for the use of the carriers and were entitled, under the plain provisions of the statute, to receive the mileage allowance, except for the fact that the shipper lessee was precluded from collecting said allowance by reason of the restrictions in

the tariffs, but that such restrictions must give way to the provisions of Section 15(13) of the Act, the only questions remaining open for determination by the Commission were:

First, what allowance should be made as the maximum to the furnisher of tank cars as compensation under Section 15(13), in light of the fact that the present mileage allowance of one and one-half cents per car mile might, in the light of general experience, result in some shippers enjoying a profit and possibly transporting their commodities at a lesser rate than others; and

Second, whether the carriers should be required to eliminate from their tariffs or orders the prohibition against the payment of the allowance to a shipper lessee, as distinguished from a car owner.

Those questions could only be effectively determined as to the future. As stated by the Court, the then tariffs had been duly published and were effective and binding upon all carriers and shippers until changed by the Commission. If it would, the Commission could not have obviated those published tariffs retroactively, and, as admitted by counsel for Appellees in their briefs, the Commission could not have required adjustment of the tariffs or allowances over a past period by shippers or carriers. The only course open to the Commission, and what must, therefore, have been intended by this Court, was a full determination, upon investigation in the light of all the facts, of a just and reasonable allowance to be paid in the future and to be set forth in the published tariffs.

It may be said that this would have left the assumpsit action in the District Court undetermined. That is true, as was pointed out in the petition for rehearing filed at the time. But, as was said by this Court, the District Court had jurisdiction of the subject-matter and the parties, and the only issue was that arising from the defense tendered by the Car Company that the payment by it, in accordance with the lease agreement, of the mileage collected from the carriers would constitute a violation of the provisions of the Elkins Act. That issue involved a question of fact. To be sure, it concerned the effect of the future payments by the Car Company of mileage allowances improperly received by it and retained in breach of its agreement. This did not commit to the Commission the authority to decide whether previous payments made by the Car Company under the terms of the agreement constituted an undue preference of the Oil Works as a shipper or an unjust or unreasonable preference under the Act. That question was not in issue in the case and, as before stated, it was, in any case, a question of law peculiarly within the province of the Court.

The Commission's decision (R. 249) that Appellants were only entitled to receive the amount of the car rentals and that such an amount had been paid to them by the Car Company was, in effect, a decision that Appellants were not entitled to recover in the civil action. As before stated, the Commission had no such authority under the Constitution or the Interstate Commerce Act, and this Court did not transfer

to the Commission the authority of the District Court in respect to the civil action. Moreover, if, as counsel clair , the Commission was without authority to determine that further payments were due to Appellants under the agreement, it was equally without authority to determine as it did that such payments were not due. Counsel for Appellees in their pleadings in the lower Court and in their briefs in this Court assert that the Commission merely decided some questions involved in the assumpsit action and its decision was ancillary to the civil action and an authoritative guide for the District Court. If these contentions are correct, the Commission performed some of the functions of the civil Court and such action was beyond the authority of the Commission under the Constitution, the cognate statute and the previous decisions of this Court.

Opposing counsel claim that the decision of the Commission may be ignored or set aside by the One Judge District Court. It is inconceivable that unless the Commission's decision and order under attack is set aside, the One Judge District Court would not hold itself bound by that decision. The One Judge Court would not be warranted in setting aside the Commission's decision and order because that authority is vested only in a Three Judge Court under the provisions of the Urgent Deficiencies Act. As pointed out at page 13 of Appellants' brief on the motion to affirm, *Shannahan v. United States* and *Shields v. Utah-Idaho R. Co.*, which are cited by Appellees in support of their claim, do not recognize any such authority in the One Judge District Court.

G. THE COMMISSION'S FINDINGS AND ORDER THAT THE MAXIMUM COMPENSATION TO BE PAID BY THE CARRIERS SHOULD NOT EXCEED THE CAR RENTAL PAID BY THE SHIPPERS STEMS FROM AN ERRONEOUS VIEW OF THE LAW AND IN EFFECT IMPOSES UPON THE CARRIERS THE RESPONSIBILITY OF DETERMINING THE CAR RENTAL PAID BY A SHIPPER FOR EACH CAR FURNISHED TO THE CARRIERS. THIS PRECLUDES A UNIFORM ALLOWANCE AND THE DISCLOSURE THEREOF IN THE PUBLISHED TARIFFS AS REQUIRED BY SECTION 15(13) OF THE COMMERCE ACT.

The Commission's decision holds that car rentals vary as a result of competition and trade conditions. In its former decision (308 U.S. 422, supra), this Court also recognizes that fact. In complying with the finding under challenge, and the decision upon which it is based, the carriers would be required to determine at their peril in each instance the amount paid or payable by shipper lessees for each car furnished for transportation uses. Compliance with the order would not only open the door for preferences and discriminations, but strict compliance with the order would require the carriers to pay different mileage allowances to different shippers according to the difference in rentals paid by such shippers. This would constitute a violation of the express prohibition contained in Section 2 of the Interstate Commerce Act. In effect, the Commission has commanded the carriers to violate the express provisions of the Act. Compliance with this order would also render the carriers unable to establish and publish a uniform car allowance which is required under Section 15(13) of the Act. The order is therefore unlawful and in excess of the Commission's authority.

CONCLUSION.

For all of the reasons stated in the foregoing pages, the decision and order of the Commission, whether considered administrative or quasi-judicial or ancillary to the civil action, was without the scope of the Commission's authority and was not supported by the prerequisite evidence. The decision of the District Court should be therefore reversed and the order of the Commission annulled.

Dated, San Francisco, California,
March 11, 1946.

Respectfully submitted,
W. F. WILLIAMSON,
Counsel for Appellants.

WILLIAM B. MEAD,
WILLIAMSON & WALLACE,
Of Counsel.

In the District Court of the United States for the Northern District of California

Civil Action No. 23619–C

EL DORADO OIL WORKS, A CORPORATION, AND EL DORADO TERMINAL COMPANY, A CORPORATION, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLANTS

MOTION OF THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION TO AFFIRM DECREE OF DISTRICT COURT

Appellees United States and Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree, dated April 9, 1945, of a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing plaintiffs' complaint seeking to have set aside a certain action of the Interstate Commerce Commission. The action was taken by the Commission in *Allowances for Privately Owned Tank Cars*, 258 I. C. C. 371, which proceeding was instituted, in response to

the Supreme Court's decision in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, to determine the lawfulness of certain practices with reference to the rental of tank cars. The appeal was allowed on June 1, 1945, and the appeal papers were served on June 7, 1945.

The plaintiff El Dorado Terminal Company, is a wholly owned subsidiary of the plaintiff El Dorado Oil Works, hereinafter called the shipper, which is a corporation engaged in processing coconut oil from copra in plants at Berkeley and Oakland, California, and shipping the product in tank cars in interstate commerce. The General American Transportation Corporation, hereinafter called the Car Company, is a "private car line" rather than a common carrier and is the owner of numerous railroad cars, including tank cars, which it rents or leases to various shippers for the transportation of their products.

On September 28, 1933, the Car Company and the shipper entered into an agreement under which the former leased tank cars to the shipper. The agreement provided that the Car Company would collect from the railroads serving the shipper all mileage earned by the cars covered by the agreement and "each month credit to the rental or service account" of the shipper "all mileage earned by said cars while in the service" of the shipper "according to and subject to all rules of the tariffs of the railroads."

The tariffs of the railroads, though publishing a general provision for the payment of 1½ cents per

car per mile, both loaded and empty, for the use of tank cars of private ownership, contained rules governing the application of the provision which precluded payment of the mileage to the shipper under the circumstances of this case. The rules, in effect throughout the period here in question, provided *inter alia* that the mileage would be paid only to the "party" whose "reporting marks" appeared on the cars. It was specially provided in the agreement that all the cars covered thereby should bear the reporting marks of the Car Company. The mileage was not, therefore, under the terms of the tariff, payable to the shipper.

The terms of the agreement were observed for a period of approximately six months or until July 2, 1934, on which date the Interstate Commerce Commission rendered its decision in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323, 378–381, in which it held that the payment in whole or in part to shippers of mileage allowances by railroads, either directly or through car owners, in excess of the amount of rental such shippers pay for the use of the cars and other actual expenses in connection therewith, results in such shippers receiving transportation of their products at lower rates than those paid by shippers generally who use cars furnished by the carriers, and at less than the published rates.

After the issuance of this decision by the Commission, the Car Company refused to credit or pay over to the shipper any part of the mileage allowances in excess of the rental reserved in the lease. Until

that time the practice had been for the Car Company to collect the mileage, deduct the rental due, and pay the balance to the shipper. Thereafter, the Car Company collected the mileage allowances from the railroads, credited the shipper with the amount of the rental due, and retained the balance, refusing to pay it over to the shipper on the ground that if it did so it would be the instrumentality for the granting of unlawful concessions or rebates to the shipper. It appears that both before and after the change in the practice, the aggregate of the mileage earnings each month exceeded the rental due from the shipper. Throughout the entire period, therefore, the shipper paid nothing to the Car Company for the use of the cars.

In June 1935, the El Dorado Terminal Company, as assignee of the shipper, brought suit against the Car Company in the United States District Court for the Northern District of California to recover the unpaid excess mileage earnings which had accrued from the use of the leased cars up to May 31, 1935. The amount claimed was $18,532.78. Judgment for the Car Company was rendered by the District Court, but was reversed on appeal by the United States Circuit Court of Appeals for the Ninth Circuit, which held (104 F.2d 903) that the Terminal Company, the shipper's assignee, was entitled to the full amount claimed. The Supreme Court granted certiorari and subsequently held in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, 432, 433, that the "question of the reasonableness and

legality of the practices of the parties was subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission," and that "when it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act." The judgment of the circuit court of appeals was reversed and the cause remanded to the district court to be there held "pending the conclusion of an appropriate administrative proceeding" by the Commission (308 U. S. at p. 433).

Pursuant to a petition subsequently filed with it by the shipper and its assignee, the El Dorado Terminal Company, the Commission instituted an investigation to determine (258 I. C. C. 371, 374):

> (1) whether the practices involved under the terms and operations of the lease contract are unlawful in violation of the Interstate Commerce Act;
>
> (2) whether a reasonable charge or allowance may be paid, and, if so, the amount thereof as a maximum to be paid, by the carrier or carriers by railroads for the use of the tank cars furnished such carriers by petitioners for the transportation of the products of petitioners in interstate commerce from Berkeley and Oakland, Calif., in the period January 1, 1934, to December 31, 1936; and
>
> (3) what findings shall be made, or what rules, regulations, or practices shall be pre-

scribed, or what orders shall be entered, to remove any unlawfulness that may be found to exist.

Numerous common carriers by rail were made respondents in the proceeding. Following a hearing, in which the said respondents and the Car Company participated, the Commission issued its report. The Commission therein reviewed the action of the courts, considered in the light of the record made in the administrative proceeding the reasonableness and legality of the practices involved, and made findings in respect thereof, all in compliance with the direction of the Supreme Court in the *El Dorado Terminal Co.* case that the Commission's administrative judgment in the premises be obtained. At the conclusion of its report the Commission discontinued the proceeding after stating its conclusions as follows (258 I. C. C. at pp. 380–381):

> (1) That the rental paid or to be paid by El Dorado Oil Works [the shipper] to General American Tank Car Corporation [now the General American Transportation Corporation] under the terms of the lease agreement between those parties, dated September 28, 1933, was the only cost incurred by the former in furnishing the tank cars in which its shipments moved. A just and reasonable allowance as a maximum to have been paid by the respondents, rail carrier or carriers, to the Oil Works for the furnishing of such cars would have been an amount not to exceed such rental. Such an amount and allowance has been paid to the Oil Works through

credits made to the account of the Oil Works by the Tank Car Corporation.

(2) That an allowance to the Oil Works by the respondents, rail carrier or carriers, or by the Tank Car Corporation, under the agreement, in excess of said rental would be unjust and unreasonable, and would unduly prefer the Oil Works as a shipper of its commodities transported by it in the tank cars herein involved. The amount paid by the Tank Car Corporation to the Oil Works prior to July 1, 1934, under the terms of the agreement, to the extent it was in excess of the rentals due thereunder, was unjust and unreasonable, and unduly preferred the Oil Works as a shipper of its commodities.

(3) That the Oil Works is entitled to no allowance from the respondents, rail carrier or carriers, directly or through the Tank Car Corporation, for the special cleaning and preparation of the tank cars during the period of the agreement, January 1, 1934, to December 31, 1936.

In the suit thereafter brought under the Urgent Deficiencies Act by the shipper, it assumed and contended that the findings of the Commission, above described, coupled with its order discontinuing the proceeding, constituted an "order" within the meaning of that Act and it asked that the same be enjoined and set aside on the grounds, primarily, of lack of substantial evidence. The United States and the Commission defended on the merits but also insisted that the District Court, specially constituted as a court of three judges, was without jurisdiction.

In dismissing the complaint, the three-judge court sustained the latter contention, saying in part that

> By its finding and determination with respect to the practice here involved, the Interstate Commerce Commission made no decision which required any party to the proceeding before it to do or not to do any specific act. It followed the directions of the Supreme Court (*General American Tank Car Corp.* v. *El Dorado Terminal Co., supra* [308 U. S. 422]), and determined, under the Interstate Commerce Act, the lawfulness and reasonableness of the practice which had obtained between plaintiff and the tank car company. When this was done, its job was done. It was not required to make any order and made none and, having completed its work, stamped "finis" thereon and discontinued the proceeding. Hence there is no order, in the sense contemplated in the statute, requiring review by this court (*U. S.* v. *Griffin*, 303 U. S. 226, 233; *U. S.* v. *Ill. Cent. R. R. Co.*, 244 U. S. 82; *D. & H. Co.* v. *U. S.*, 266 U. S. 438; *U. S.* v. *L. A. Ry. Co.*, 273 U. S. 299).[1]

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[1] None of these four cases was overruled by *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. See 307 U. S. at pp. 130, 131, 135; see also *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 301; *Chicago & North Western Ry. Co.* v. *United States*, 320 U. S. 718. An excerpt from Mr. Justice Brandeis' opinion in the *Griffin* case is particularly relevant (303 U. S. at p. 233):

"In the opinion of Congress jurisdiction with the extraordinary features of the Urgent Deficiencies Act was justified by the character of the cases to which it applied—cases of public importance because of the widespread effect of the

> The procedure specified by the Supreme Court in *General American Tank Car Corp.* v. *El Dorado Terminal Co., supra*, has been followed. The administrative practice involved has been passed upon by the Interstate Commerce Commission. The parties may now proceed in the assumpsit action. Therein, in our opinion, the court may determine plaintiff's cause and, upon tender thereof, any competent defenses thereto.

Although the appeal presents a somewhat novel jurisdictional question, we submit that the opinion of the three-judge court was correct and that its decree should accordingly be affirmed without argument.

At the outset it should be emphasized that the action of the Commission in the investigation conducted by it was merely an ancillary step in a pending action of assumpsit brought by the shipper against the Car Company. The Supreme Court directed that the court in which that suit was pending should stay

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decisions thereof. In such cases Congress sought to guard against ill-considered action by a single judge and to avert the delays ordinarily incident to litigation. In construing the Act, this Court concluded that, despite the broad language used in the Commerce Court Act, Congress could not have intended to include in this special jurisdiction suits to set aside every kind of order issued by the Commission. For substantially every decision and every other kind of action by the Commission is expressed in, or is followed by, an order; and many of the orders are obviously not of such public importance and widespread effect as to justify, in cases affecting them, the extraordinary features of the Urgent Deficiencies Act."

its hand pending a determination by the Commission of the administrative question as to the amount, if any, of the allowance to be paid to the shipper as reasonable compensation for facilities supplied by it to the carrier. *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422. The Commission, in making its determination that the maximum permissible allowance would be the cost of renting the cars from the Car Company and that any allowance in excess thereof would constitute an unjust preference or rebate, was simply facilitating the conduct of the assumpsit action by performing a task referred to it in the course of the pending lawsuit.

In the *El Dorado Terminal Co.* case, the Supreme Court held that, the action being one in assumpsit on a written instrument, the lease agreement, the single-judge district court had jurisdiction of the subject matter and of the parties. While the money for which the shipper sued was not in the custody of the court, it was, nevertheless, money which the court, because of its jurisdiction over the agreement and the parties, could reach by its judgment or orders, whereas the Commission could not. The Commission could aid the court by determining the reasonable amount of allowance to which the shipper was entitled for the cars it had furnished the railroads in connection with its shipments.[2]

But it is clear that the Commission did not itself undertake to give effect to its determination and findings by making any order requiring the payment

[2] In the *El Dorado Terminal Co.* case, the Supreme Court explained that shippers requiring a specialized form of freight car for transportation of their products frequently rent the cars from car companies and then furnish them to the railroads. For so supplying the cars used in transport-

of money, or the performance of any other act either by the Car Company or by the carriers. Nothing purporting to give effect to that determination or those findings is contained in the Commission's order discontinuing the proceeding. That

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ing its products, a shipper is entitled to an allowance from the railroads out of the rates which it pays for the transportation. (See 308 U. S. at p. 429.)

But since any such allowance which would more than compensate the shipper for the expense to which he is put would result in his obtaining transportation at lower cost than shippers generally under the rates and thus amount to a rebate, the statute, while authorizing allowances to shippers furnishing "services or facilities" in connection with their shipments, specially provides that such allowances shall be no more than just and reasonable and that the Commission is to determine what would constitute a just and reasonable maximum allowance. Section 15(13) of Part I of the Interstate Commerce Act (49 U. S. C. 15(13)).

[3] The order reads as follows:

"*It appearing*, That by order dated July 24, 1940, the Commission, in response to a joint petition filed by El Dorado Oil Works and El Dorado Terminal Company, instituted and [an] investigation to determine the lawfulness of the practices under the terms of a contract dated September 28, 1933, between the El Dorado Oil Works and the General American Tank Car Corporation, and the reasonableness of the allowance to be paid by carriers by railroad for the use of tank cars furnished such carriers by the El Dorado Oil Works for the transportation of its products in interstate commerce during the period from January 1, 1934, to December 31, 1936;

"*It, further, appearing*, That a full investigation of the matters and things involved has been had, and that the parties have been fully heard, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

"*It is ordered*, That the proceeding be, and it is hereby, discontinued."

order, as its phraseology discloses, was merely a procedural step indicating that the docket was closed. Since all that was required of the Commission, in order to enable the court in the assumpsit action to exercise its jurisdiction and perform its functions was that the Commission determine the lawfulness of the practices and the just and reasonable allowance, if any, due the shipper, there is no occasion or reason for treating the findings and determinations as an order reviewable under the Urgent Deficiencies Act, rather than in the single-judge assumpsit action.

As shown by the decisions cited in the opinion of the three-judge court, the jurisdiction conferred on the district court by the Urgent Deficiencies Act [4] was designed for judicial review of only the Commission's orders of real substance. Although the jurisdiction conferred in terms covers suits to enjoin "any order of the Interstate Commerce Commission," such jurisdiction has not only been held not to extend to mere findings and determinations in a report of the Commission (*United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522; *Shannahan* v. *United States*, 303 U. S. 596) but also not to be applicable to all orders of the Commission, it having been pointed out (*United States* v. *Griffin*, 303 U. S. 226, 233) that practically every step taken by the Commission is preceded by the words "it is ordered." Thus in *United States* v.

[4] This jurisdiction was originally vested in the Commerce Court created by the Commerce Court Act of 1910. 36 Stat. 539. By the Urgent Deficiencies Act, the Commerce Court was abolished and its jurisdiction transferred to the several district courts of the United States. 38 Stat. 208, 219.

Illinois Cent. R. Co., 244 U. S. 82, 89, it was held that an order of the Commission assigning a case for hearing was not a reviewable order within the meaning of the Urgent Deficiencies Act and was nothing more than a mere notice of a hearing, the Court saying that

> The notice, therefore, had no characteristic of an order, affirmative or negative. It was a mere incident in the proceeding, the accident of the occasion—in effect, and, it may be contended, in form, but a continuance of the hearing. The fact that the continuance was to another day and place did not change its substance or give it the character described in *Procter & Gamble Co.* v. *United States* [225 U. S. 282], one which constrained the railroad company to obedience unless it was annulled or suspended by judicial decree.

While certain so-called "permissive orders" of the Commission are orders which are reviewable by three-judge courts, these are orders authorizing the carriers to do what the Interstate Commerce Act forbids them from doing without first obtaining the Commission's authority, such as the issuing of securities, the acquisition of new lines or the abandonment of existing lines. *Chicago Junction Case*, 264 U. S. 258, 263; *Venner* v. *Michigan Cent. R. Co.*, 271 U. S. 127, 131. It is evident that the order of the Commission in the instant case is not an order within this category any more than it is a mandatory order constraining carriers to obey commands of the Commission. Moreover, there are many other kinds of orders of the Commission which have been held not

to be reviewable under the special three-judge court jurisdiction, most of which are cited in the *Griffin* case (303 U. S. 226), which contains a comprehensive history of orders reviewable under the Urgent Deficiencies Act.

It is true that "negative orders" such as involved in *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, constitute the largest class of orders which in the past have been held not to be reviewable and that the doctrine that such orders are not reviewable has been overturned. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 142; *United States* v. *Maher*, 307 U. S. 148. However, the decision in the *Rochester Telephone Corp.* case applies only to "negative order" cases and it, in fact, expressly distinguishes (p. 130) such cases as *United States* v. *Illinois Cent. R. Co.*, 244 U. S. 82; *United States* v. *Los Angeles & S. C. R. Co.*, 273 U. S. 299; and *Shannahan* v. *United States*, 303 U. S. 596.

The order of discontinuance here involved simply indicates that the docket was closed and is an order of no more force and effect than the notice (termed an order) of hearing involved in *United States* v. *Illinois Cent. R. Co.*, 244 U. S. 82. Such order cannot, compatibly with the Commission's findings and the subject matter involved, be regarded as an order of dismissal or other "negative order" such as is now reviewable under the three-judge court rule. While, as held by the Supreme Court in the *El Dorado Terminal Co.* case, the shipper here was entitled to a reasonable allowance, the emphasis laid by the Court,

and by the Commission throughout, is on the Interstate Commerce Act's requirement (sec. 15 (13)) that such allowance shall not amount to excessive compensation to the shipper and thus constitute an illegal rebate. It is to the prevention of this that the Commission's findings are directed. If the Commission had intended to give effect thereto by an order of its own, directed either to the parties to the agreement, or to the carriers, such order would not have been one merely discontinuing the proceeding but would have been an order which, conformably to the issues and the findings, would have affirmatively forbidden the payments called for by the agreement, and required adjustment to the basis of the maximum amount of allowances to which the Commission found the shipper to be lawfully entitled.

It is evident that the Commission's findings were neither adapted to, nor intended for, carrying out by orders of its own, whether affirmative or negative. Although the Commission, by its findings, authoritatively fixed the reasonable amount of allowance payable to the shipper, it was without authority to enter affirmative orders directing the payment thereof either by the Car Company or by the carriers. The Car Company was not subject to the Commission's authority in any respect. See the *El Dorado Terminal Co.* case, 308 U. S. at p. 428. An order directing the carriers to pay the reasonable allowance found due was equally beyond the Commission's authority, for, even if the shipper's petition to the Commission were to be regarded as a

complaint asking for an award of reparation, the period of time within which such a complaint could be filed had long since lapsed.[5]

The shipper's petition to the Commission was not a complaint invoking the Commission's authority independently of the action in assumpsit in the district court. The shipper was a party to the lease agreement with the Car Company and, based on the agreement, it brought the action in assumpsit. The bringing by the shipper of a lawsuit to recover the mileage allowances to which it claimed to be entitled negates any possibility that its petition to the Commission was a complaint for recovery directly through the Commission upon its claim for the same mileage allowances. In any event, it is evident on the fact of the pleadings that the shipper's petition to the Commission (258 I. C. C. at p. 373) was not an independent complaint, but was filed responsive to the Supreme Court's holding and instructions in its decision on the appeal in the court action in as-

[5] Since, as held in the *El Dorado Terminal Co.* case, 308 U. S. at p. 431, it was the shipper, and not the Car Company, which furnished the cars to the railroads, the shipper might (except for its agreement with the Car Company) have complained to the Commission and sought an award of damages (sec. 8 of the Interstate Commerce Act; see also *Paragron Ref. Co.* v. *Alton & S. R. R.*, 118 I. C. C. 166, 168). The time within which such a complaint may be filed is limited to two years (sec. 16 (3) (b)), and such provision of Section 16 "is not a mere statute of limitations but is jurisdictional." *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638, 642. Here the petition was not filed until 1940 although the cause of action accrued in 1934.

sumpsit brought by the shipper. See the *El Dorado Terminal Co.* case, 308 U. S. at p. 433.

As already stated, the Supreme Court, on certiorari in the assumpsit action in the *El Dorado Terminal Co.* case, held that the district court had jurisdiction of the lease agreement and of the parties. The Court's only qualification was that the district judge should have stayed his hand until the Commission had passed on the administrative questions involved. "There should not be a dismissal," the Court said, "but, as in *Mitchell Coal Co.* v. *Pennsylvania R. Co.*, *supra* [230 U. S. 247], the cause should be held pending the conclusion of an appropriate administrative proceeding. Thus any defenses the petitioner [Car Company] may have will be saved to it." (See the *El Dorado Terminal Co.* case, 308 U. S. at p. 433.) In the *Mitchell Coal* case, 230 U. S. 247, the Supreme Court expected the Commission only to make a determination or "ruling as to the reasonableness of the practice and the allowance involved" (*ibid.*, p. 267), and the Commission, in responding thereto, made such a ruling apparently without an accompanying order. *Mitchell Coal Co.* v. *Penna. R. R.*, 38 I. C. C. 43, 50. Thereafter, the case did not require further resort to the district court, but, if it had, the language at the end of the Supreme Court's decision (230 U. S. at p. 267) shows that the defendant would have had "the right to be heard on its plea of the statute of limitations as of the time the suit was filed and any other defense which it may have." Under this language it would

seem that the defendant, in such case, might have urged in defense the usual grounds for review of administrative determinations, *viz*, that the Commission's ruling was beyond its authority, without support in the evidence or otherwise arbitrary.

It was clearly recognized in *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 132, and *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407, 415, that a suit cannot be maintained under the Urgent Deficiencies Act unless the complaint states a cause of action in equity. It is elementary that the requisites of equity jurisdiction are lacking where there is an adequate legal remedy, or where the complainant is not faced with any immediate threat of interference with its rights. The Supreme Court's opinion in the *El Dorado Terminal Co.* case seems to imply that the same limited review of the Commission's action ordinarily obtainable before a three-judge court should be obtainable with respect to the instant "order" in the pending proceedings at law before a single judge, for it stated that "any defenses the petitioner [Car Company] may have will be saved to it." The Court said that there was remitted to the one-judge court "only the function of enforcing claims arising out of the failure to comply with the Commission's lawful orders," thereby seemingly recognizing that the one-judge court could determine whether the Commission's action was lawful. The Court said, too, that the one-judge proceeding should be held up "pending the conclusion of an appropriate administrative pro-

ceeding," apparently indicating that, once the Commission reported, only the one-judge court was to proceed. (See 308 U. S. at pp. 432-433.) As in *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, we believe that the present action of the Commission is reviewable only in the one-judge proceeding. Since the appellants would have an adequate remedy through a review of the Commission's action in the one-judge proceeding and since the Commission's action here cannot pose an immediate threat to appellants' rights until the one-judge court has passed upon its validity, the appellants have failed to satisfy the conventional requirements of equity jurisdiction.

In *United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522, the Supreme Court pointed out that the Commission had various duties and functions, which, while "calling" for findings and determinations, did not "call" for orders, and, although the Court did not specifically refer to situations of administrative rulings necessary to lawsuits, such situations fall clearly within the same principles. The decisions in *Shannahan* v. *United States*, 303 U. S. 596, and in *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, taken together, show both that the Commission's mere findings and determinations are not reviewable under the Urgent Deficiencies Act and that the proper place for their review is in the court where the questions determined are in issue. Accordingly, we maintain that the Commission's action here can be

reviewed only in the one-judge district court trying the assumpsit action.

For the foregoing reasons, it is respectfully submitted that the decree of the District Court should be affirmed.

Charles Fahy,
CHARLES FAHY,
Solicitor General.
Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

JUNE 1945.

(Endorsed.) Filed June 22, 1945.

U. S. GOVERNMENT PRINTING OFFICE 1945

In the Supreme Court of the United States

October Term, 1945

No. 128

EL DORADO OIL COMPANY and EL DORADO TERMINAL COMPANY, *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL AMERICAN TRANSPORTATION CORPORATION, et al., *Appellees*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS

Brief for General American Transportation Corporation, Appellee

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(d) After full hearing the Commission found and concluded that a just and reasonable allowance as a maximum to have been paid to the El Dorado Company for the cars in which its shipments moved would have been an amount not exceeding the rental payable by it under the terms of the lease contract and that an allowance in excess of such rental would be unjust and unreasonable and would unduly prefer the El Dorado Company as a shipper of its commodities 15

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 428

EL DORADO OIL COMPANY and EL DORADO TERMINAL COMPANY, *Appellants,*

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL AMERICAN TRANSPORTATION CORPORATION, et al., *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

Brief for General American Transportation Corporation, Appellee

INTRODUCTORY

This brief is presented in behalf of appellee, General American Transportation Corporation (intervening defendant in the United States District Court), successor in interest to General American Tank Car Corporation, defendant in the suit in the United States District Court out of which the instant cause has arisen. For convenience, each of these two corporations will be hereinafter referred to without distinction as the "Car Corporation." Similarly, the appellants herein, El Dorado Oil Works and El Dorado Terminal Company, will be referred to without distinction as the "El Dorado Company."

The United States District Court, specially constituted of three judges under the Urgent Deficiencies Act (38 Stat. 219; 28 U.S.C., Secs. 41(28) and 43-48, inclusive) concluded that that court was without jurisdiction of this suit and for that reason the suit should be dismissed (R. 33-40). The Court said: "We do not pass upon the merits of the cause * * *" (R. 35). By the final decree the relief prayed for was denied and the complaint was dismissed "for want of jurisdiction" (R. 40-41).

It would seem, accordingly, that the only issue cognizable upon this appeal is that of jurisdiction. However, the brief for appellants goes beyond the issue of jurisdiction and enters upon the merits, presumptively as background for the jurisdictional point.

Since the briefs to be filed on the part of the United States and the Interstate Commerce Commission will doubtless deal fully with the issue of jurisdiction; we shall refrain from discussing that issue in the brief for this appellee. We shall address ourselves to appellants' contentions on the merits, although we understand that upon this appeal the Court is concerned, primarily at least, with the ruling of the court below that it was without jurisdiction of the suit.

OPINIONS BELOW

The opinion of the specially constituted District Court (R. 33) is reported in 59 F. Supp. 738.

The report of the Interstate Commerce Commission is reported in 258 I.C.C. 371.

JURISDICTION

The decree of the District Court was entered April 9, 1945 (R. 40). The petition for appeal filed June 1, 1945, was allowed the same day (R. 41). Probable jurisdiction was noted October 15, 1945. The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (U.S.C., Title 28, Sec. 47), and Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U.S.C., Title 28, Sec. 345).

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in the Appendix.

STATEMENT OF THE CASE

This cause had its origin in a suit at law brought by the El Dorado Company, lessee of certain railroad tank cars from the Car Corporation, the owner and lessor of such cars, to recover from the Car Corporation certain moneys, hereinafter styled "car mileage," received by the Car Corporation from the rail carriers as compensation for the use of the cars in the transportation of property of the El Dorado Company in interstate commerce. The moneys sought to be recovered by the El Dorado Company constitute the excess of the car mileage, so received by the Car Corporation from the rail carriers, above the amount of the car rental payable by the El Dorado Company for the leased cars. Under the terms of a so-called

lease agreement (September 28, 1933) (R. 52) the Car Corporation agreed, for a term of three years commencing on January 1, 1934, to furnish tank cars to the El Dorado Company for the shipment of the latter's products at a specified monthly rental for each car. It was provided that fifty cars, styled "Permanent Cars," should be so furnished at a rental of $27.50 per car per month, and that such additional cars as the El Dorado Company might require would be furnished at a rental of $30 per car per month. It was further provided that the Car Corporation would collect from the rail carriers over whose lines of railway such cars would pass the car mileage payments made by the rail carriers as compensation for the use of such cars in railroad service and would credit the payments so collected to the car rental or service account of the El Dorado Company. The car mileage payments so made by the rail carriers substantially exceeded the El Dorado Company's car rental. During the three-year period covered by the agreement the car mileage earnings exceeded the car rental by $33.04 per car per month on the average (R. 234, 235).

For approximately six months the Car Corporation credited the El Dorado Company with the full amount of the car mileage and paid over to the El Dorado Company the excess of the car mileage over the car rental. On July 2, 1934, the Interstate Commerce Commission issued its report in a case entitled *"Use of Privately Owned Refrigerator Cars,"* 201 I.C.C. 323 (1934), in which it was held that the payment to shippers of car mileage earnings, "either direct or through car owners," in excess of the amount of the rental paid for the use of the cars and other

actual expenses in connection therewith, is in violation of the Elkins Act. The findings of the Commission were confined to practices in connection with the use of privately owned refrigerator cars, since the investigation itself was thus limited. But the Commission pointedly observed:

> "The discussion herein has been confined almost entirely to refrigerator cars and the findings will be so restricted, but the general principles enunciated apply equally to all other types of private cars" (R. 248).

Pursuant to this decision condemning practices of this character as violative of the Elkins Act, the Car Corporation, which theretofore had faithfully made the agreed payments, refused further to credit or pay over to the El Dorado Company the car mileage earnings in excess of the car rental. This change in practice on the part of the Car Corporation was based on its conclusion, upon advice of counsel following the decision of the Commission referred to above, that such payments would be in violation of the Elkins Act (R. 193). Accordingly, commencing after the month of June, 1934, the Car Corporation credited the car mileage to the El Dorado Company in amounts equal to the car rental or service charges but made no payment of the excess.

By its suit at law the El Dorado Company sought to recover the balance of the car mileage payments which had been received by the Car Corporation during the period extending from January 1, 1934 to May 31, 1935. This balance, i.e., the unpaid excess above the car rental, amounted to $18,532.78 (R. 239). In defense the Car Corporation pleaded that it was prohibited by the Elkins Act from paying over such excess car mileage revenue to the

El Dorado Company in that, by such payment, the El Dorado Company would secure the transportation of property at rates less than the tariff rates, thereby obtaining a rebate or concession and an advantage or a discrimination. The text of this plea in defense has been set forth in the answer of the Car Corporation to the complaint in the District Court in the instant case (R. 24).

The United States District Court for the Northern District of California sustained the Car Corporation's plea in defense and gave judgment accordingly for the Car Corporation. Upon appeal, the United States Circuit Court of Appeals for the Ninth Circuit reversed the judgment of the District Court (*El Dorado Terminal Company v. General American Tank Car Corporation*, 104 Fed.(2d) 903). Upon the petition of the Car Corporation the Supreme Court of the United States granted a writ of certiorari. On January 2, 1940, the Supreme Court reversed the judgment of the Circuit Court of Appeals and remanded the cause to the District Court, directing that the cause be held pending the conclusion of an appropriate administrative proceeding before the Interstate Commerce Commission. (*General American Tank Car Corporation v. El Dorado Terminal Company*, 308 U.S. 422 (1940).)

On June 7, 1940, the El Dorado Company filed a petition with the Commission (R. 43-57) praying "that the Commission cause an investigation to be made of the practices disclosed by the said action, and in the said opinion of the United States Supreme Court," and that after such investigation "the Commission enter its order holding that payment by the General American Tank Car Corporation to petitioners of the amounts so collected by said

tank car corporation as mileage allowances for the use of the tank cars leased by petitioners and furnished by them to the railroad carriers may be made as provided in and for the entire period covered by the agreement of the parties dated September 28, 1933, without the violation of any provisions of the Elkins Act, and that the payments so made are reasonable and will not accomplish a rebate, concession or an advantage or discrimination in favor of either of the petitioners or in violation of the provisions of the Elkins Act * * *." (R. 51).

Pursuant to the petition of the El Dorado Company the Interstate Commerce Commission on July 24, 1940, made its order instituting an investigation (R. 57, 58). All common carriers by railroad participating in Trans-Continental Freight Bureau Tariff No. 3-N, I.C.C. No. 1452, were made respondents. The matter was heard before an Examiner of the Commission on December 9 and 10, 1940. Evidence was presented on the part of the El Dorado Company and, in turn, on the part of the respondent rail carriers, and likewise on the part of the Car Corporation, which intervened in the proceeding (R. 61-236). The Commission's report was issued under date of April 10, 1944 (R. 237-260). A petition on the part of the El Dorado Company for rehearing was denied (R. 261).

The El Dorado Company brought the instant suit, in the specially constituted District Court of three judges, praying for a decree declaring that the Commission's order is null and void and that it be set aside. From the final decree of that court, dismissing the action for want of jurisdiction, the El Dorado Company has prosecuted this appeal.

SUMMARY OF ARGUMENT

1. The Interstate Commerce Commission properly heard and determined the administrative question defined in the opinion of this Court in *General American Tank Car Corporation v. El Dorado Terminal Company, et al.*, 308 U.S. 422 (1940).

(a) This Court defined the administrative question, held to be within the competence of the Commission, as "the question of the reasonableness and legality of the practices of the parties" under the terms and operation of the lease contract.

(b) By its petition to the Commission the El Dorado Company prayed that an investigation be made of "the practices disclosed by the said action" and that the Commission enter an order holding that the car mileage in full might be paid by the Car Corporation to the El Dorado Company without violation of law.

(c) The Commission's order of investigation, entered in response to the petition of the El Dorado Company, called for an investigation to determine whether the practices involved under the terms and operation of the lease contract were unlawful in violation of the Interstate Commerce Act (R. 57, 58).

(d) After full hearing the Commission found and concluded that a just and reasonable allowance as a maximum to have been paid to the El Dorado Company for the cars in which its shipments moved would have been an amount not exceeding the rental payable by it under the terms of the lease contract and that an allowance in excess of such rental would be unjust and unreasonable and would unduly prefer the El Dorado Company as a shipper of its commodities.

2. The Commission's determination "that an allowance to the Oil Works by the respondents, rail carrier or carriers, or by the Tank Car Corporation, under the agreement, in excess of said rental would be unjust and unreasonable, and would unduly prefer the Oil Works as a shipper of its commodities transported by it in the tank cars here involved," is fully supported by evidence.

3. An administrative order of the Commission is subject to judicial review to the extent only of determining whether the order is within the scope of the Commission's authority and the basic prerequisites of proof have been satisfied

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ARGUMENT

I.

THE INTERSTATE COMMERCE COMMISSION PROPERLY HEARD AND DETERMINED THE ADMINISTRATIVE QUESTION DEFINED IN THE OPINION OF THIS COURT IN GENERAL AMERICAN TANK CAR CORPORATION V. EL DORADO TERMINAL COMPANY, ET AL., 308 U.S. 422 (1940).

It is important at the threshold to determine the nature of the issue which arose in the initial suit, as it has been formulated and characterized by this Court. In turn, consideration will be given to the issues raised in the petition of the El Dorado Company to the Commission, to the issues formulated in the Commission's order of investigation, and, finally, to the determination of those issues in the Commission's report.

(a) This Court defined the administrative question, held to be within the competence of the Commission, as "the question of the reasonableness and legality of the practices of the parties" under the terms and operation of the lease contract.

In the early part of its opinion in *General American Tank Car Corporation v. El Dorado Terminal Company, et al.*, 308 U.S. 422 (1940), this Court considered matters of general principle. That discussion, however, is wholly preliminary in character. When the Court addressed itself directly to the issue which had arisen in the litigation by reason of the affirmative defense pleaded by the Car Corporation, it expressed itself as follows (p. 428):

> "We hold that the District Court had jurisdiction but that, upon disclosure of the terms and operation of the lease contract, it should not have proceeded to adjudicate the rights and liabilities of the parties in the absence of a decision by the Commission with respect to the validity of the practice involved in the light of the provisions of the Interstate Commerce Act."

The Court said further (pp. 431-432):

> "• • • If it should appear that, with respect to the tank cars in question, the shipper-lessee is making substantial profits on leased cars, by reason of the excess of the mileage allowances over the rentals paid, it might in the light of all the facts be found that the shipper is, in the result, obtaining transportation at a lower cost than others who use cars assigned them by the carriers or own their own cars. The Commission has found that, in the case of refrigerator cars, held under similar leases, this has been the case.[12] The inquiry into the lawfulness of the practice

[12] Re Use of Privately Owned Refrigerator Cars, 201 Inters. Com. Rep. 323.

is one peculiarly within the competence of the Commission.

As the tariffs now contain no provision for the payment of car mileage allowances by the railroad to the shipper directly, and as, upon the face of things as disclosed by this record, the shipper is apparently reaping a substantial profit from the use of the cars, a clear case is made for the exercise of the administrative judgment of the Commission. The Circuit Court of Appeals, without supporting evidence in the record as to any specific items, said that there are obviously other expenses which the shipper must bear over and above the actual rental paid. If this were so, the reflection of those expenses, as well as the rental itself, in the allowance paid by the carrier to the shipper for the use of the latter's cars, would be a matter for the administrative judgment of the Commission and not for determination by a court."

The Court said again (p. 432) that

"the question of the reasonableness and legality of the practices of the parties was subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission."

This is the language in which the Court has identified the administrative problem, has assimilated it to the problem which arose "in the case of refrigerator cars," and has plainly implied that a factual parallel would call for parallel conclusions. This is the specific issue which, as this Court said, called clearly "for the exercise of the administrative judgment of the Commission." It will be noted that the Court refers to "*the validity of the practice involved in the light of the provisions of the Interstate Commerce*

Act," namely, the practice under "*the terms and operation of the lease contract.*" The Court declares that "*The inquiry into the lawfulness of the practice is one peculiarly within the competence of the Commission.*"*

This Court did not say that the Commission should make an order prescribing allowances for the future. It approved the Commission's action in the *Private Refrigerator Car case*, supra, and there the Commission made no order but simply condemned the payment to shipper-lessees of allowances in excess of their actual costs as reflected by their rental payments.

This Court addressed itself to a particular issue which had arisen in the litigation by reason of the Car Corporation's plea in defense, viz., whether car mileage in excess of car rental could be paid over by the Car Corporation to the El Dorado Company without violating the Elkins Act. This was held to be an administrative question reserved for the Commission's determination. There could have been no administrative question so reserved if this Court had intended to rule that the El Dorado Company is entitled to receive the excess car mileage. Nor would this Court have referred to the findings and conclusions of the Commission "in the case of refrigerator cars, held under similar leases" without implying that parallel facts would call for a parallel conclusion. The Court observed that, "upon the face of things as disclosed

*It is stated in appellants' brief (p. 13) that this Court in the course of its opinion "upheld the validity of the car leasing agreement." This is inexact. The Court upheld the propriety of car leasing agreements in general but did not undertake to determine the validity of practices under the instant agreement (p. 429). That question was specifically reserved for determination by the Commission.

by this record, the shipper is apparently reaping a substantial profit from the use of the cars," and, for that reason, "a clear case is made for the exercise of the administrative judgment of the Commission." This language is wholly incompatible with the El Dorado Company's contention that it is of right entitled to reap this "substantial profit."

The question was left to the Commission, for its administrative determination. The District Court was required to stay its hand pending the result of an appropriate proceeding before the Commission (p. 433).

(b) By its petition to the Commission the El Dorado Company prayed that an investigation be made of "the practices disclosed by the said action" and that the Commission enter an order holding that the car mileage in full might be paid by the Car Corporation to the El Dorado Company without violation of law.

The prayer of the petition filed by the El Dorado Company with the Commission prays that "the Commission cause an investigation to be made of the practices disclosed by the said action" and further prays that "the Commission enter its order holding that payment by the General American Tank Car Corporation to petitioners of the amount so collected by said Tank Car Corporation as mileage allowances for the use of the tank cars leased by petitioners and furnished by them to the railroad carriers may be made as provided in and for the entire period covered by the agreement of the parties dated September 28, 1933, without the violation of any provisions of the Elkins Act, and that the payments so made are reasonable and will not accomplish a rebate, concession or an advantage

or discrimination * * * in violation of the provisions of the Elkins Act" (R. 43, 51).

Nowhere in the petition is there a request that the Commission make an investigation looking to the prescription of a car mileage rate for general application, or a prayer for an order that car mileage at that rate be paid over to the El Dorado Company. On the contrary, the petition is confined specifically to "*practices disclosed by the said action,*" and its objective is an order requiring that the mileage allowances in full may be paid over to the El Dorado Company, notwithstanding that they substantially exceeded the car rental payable by the El Dorado Company for the use of the cars. In brief, the petition of the El Dorado Company raises nothing more than the administrative question formulated in the opinion of this Court.

(c) The Commission's order of investigation, entered in response to the petition of the El Dorado Company, called for an investigation to determine whether the practices involved under the terms and operation of the lease contract were unlawful in violation of the Interstate Commerce Act (R. 57, 58).

The Commission's order of investigation dated July 24, 1940 (R. 58) is fully responsive to the petition of the El Dorado Company. An investigation was instituted

> "(1) to determine whether the practices involved under the terms and operation of the lease contract are unlawful in violation of the Interstate Commerce Act; (2) to determine whether a reasonable charge or allowance may be paid, and, if so, the amount thereof as a maximum to be paid, by the carrier or carriers by railroad for the use of the tank cars furnished such carriers by petitioners for the transportation of the products of petitioners in interstate commerce

from Berkeley and Oakland, Calif., in the period January 1, 1934, to December 31, 1936; and (3) to determine what findings shall be made, or what rules, regulations or practices shall be prescribed, or what orders shall be entered, to remove any unlawfulness that may be found to exist."

It will suffice to note that the order of investigation is not only responsive to the petition of the El Dorado Company but that it conforms with the opinion of this Court defining and characterizing the administrative question. That question was directed to the validity of the "*practices*" under the terms and operation of the lease contract. The El Dorado Company did not question the propriety or sufficiency of the Commission's order of investigation. Indeed, it could not well question the scope of the order since it was fully commensurate with the petition seeking the investigation.

(d) After full hearing the Commission found and concluded that a just and reasonable allowance as a maximum to have been paid to the El Dorado Company for the cars in which its shipments moved would have been an amount not exceeding the rental payable by it under the terms of the lease contract and that an allowance in excess of such rental would be unjust and unreasonable and would unduly prefer the El Dorado Company as a shipper of its commodities.

In due course the Commission held its hearing, in which the El Dorado Company was permitted to introduce all of its proffered evidence. There was no curtailment or restriction in any respect. Evidence was presented on the part of the respondent rail carriers and likewise on the part of the intervening Car Corporation. No evidence was

offered looking to the establishment of a car mileage allowance for general application. There was no suggestion that evidence of that character should be adduced. The El Dorado Company registered no objection to the adequacy or fairness of the hearing.

All of the foregoing is plain upon the record (R. 43-236).

In due course the Commission's report was issued, in which it found and concluded as follows (R. 249-250):

> "(1) That the rental paid or to be paid by El Dorado Oil Works to General American Tank Car Corporation under the terms of the lease agreement between those parties, dated September 28, 1933, was the only cost incurred by the former in furnishing the tank cars in which its shipments moved. A just and reasonable allowance as a maximum to have been paid by the respondents, rail carrier or carriers, to the Oil Works for the furnishing of such cars would have been an amount not to exceed such rental: Such an amount and allowance has been paid to the Oil Works through credits made to the account of the Oil Works by the Tank Car Corporation.
>
> (2) That an allowance to the Oil Works by the respondents, rail carrier or carriers, or by the Tank Car Corporation, under the agreement, in excess of said rental would be unjust and unreasonable, and would unduly prefer the Oil Works as a shipper of its commodities transported by it in the tank cars herein involved. The amount paid by the Tank Car Corporation to the Oil Works prior to July 1, 1934, under the terms of the agreement, to the extent it was in excess of the rentals due thereunder, was unjust and unreasonable, and unduly preferred the Oil Works as a shipper of its commodities.

(3) That the Oil Works is entitled to no allowance from the respondents, rail carrier or carriers, directly or through the Tank Car Corporation, for the special cleaning and preparation of the tank cars during the period of the agreement, January 1, 1934, to December 31, 1936."

The proceeding was thereupon discontinued (R. 260-261).

The findings and conclusions of the Commission have full record support.

It is plain from this narrative that the Commission addressed itself to the administrative question formulated in the opinion of this Court and to that question as raised in the El Dorado Company's petition for investigation, and that a proper and adequate hearing was held. Most belatedly, the El Dorado Company argues that the Commission was required to determine a just and reasonable mileage allowance for uniform application, and that it failed to do so (Appellants' Brief, p. 14). In reply it will suffice again to point out that the prescription of a uniform mileage allowance was not within the terms of the administrative question formulated by the Court and specifically entrusted to the Commission and that no request that a mileage rate be determined and prescribed was made by the El Dorado Company either in its petition for investigation or in the course of the hearing before the Commission. Even if the Commission had undertaken to make the determination which the El Dorado Company now claims should have been made, it would still have been necessary for the Commission to deal with the administrative question which has been answered by its report and order. The Commission's report and order ac-

complishes a complete determination of all that was required by the opinion of this Court defining the administrative question, and of all that the El Dorado Company presented in its petition.

There has been no "unconstitutional assumption of authority on the part of the Commission," as the El Dorado Company mistakenly contends (Appellants' Brief, pp. 14, 15). The Commission has done no more than effect the determination which this Court entrusted to it and made a condition prerequisite to further proceedings before the District Court in the pending assumpsit action.

II.

THE COMMISSION'S DETERMINATION "THAT AN ALLOWANCE TO THE OIL WORKS BY THE RESPONDENTS, RAIL CARRIER OR CARRIERS, OR BY THE TANK CAR CORPORATION, UNDER THE AGREEMENT, IN EXCESS OF SAID RENTAL WOULD BE UNJUST AND UNREASONABLE AND WOULD UNDULY PREFER THE OIL WORKS AS A SHIPPER OF ITS COMMODITIES TRANSPORTED BY IT IN THE TANK CARS HERE INVOLVED" IS FULLY SUPPORTED BY EVIDENCE.

The uncontradicted evidence of record shows that the El Dorado Company's only cost in the use of the leased cars, for which it could lawfully be compensated, was its car rental. The evidence also showed, and again without dispute, that the car mileage earnings were greatly in excess of the car rental. Upon these facts it was clear that the El Dorado Company would reap "substantial profits" if it should receive the excess of the car mileage over the car rental. Such "profits," in the view of the Commission, would be rebates and concessions, and would

unduly prefer the El Dorado Company as a shipper of its commodities, in violation of the Elkins Act and other provisions of law. The Commission had previously condemned such payments to shippers, in excess of their car rental and other costs, by its decision in

Use of Privately Owned Refrigerator Cars, 201 I.C.C. 323 (1934).

It is not an answer, as the El Dorado Company contends upon brief (p. 16), that the carriers received their full freight charges under the applicable freight tariffs. The point is that the receipt by the El Dorado Company of the excess of the car mileage over the car rental and other actual expenses, if any, which the carriers are permitted to bear, would operate automatically to reduce the tariff rate. It is this excess car mileage which constitutes the "substantial profit" which the Commission condemned in *Use of Privately Owned Refrigerator Cars, supra*, as a rebate or concession and an unjust discrimination. As the Commission said on page 381 of its report in that case:

> "It cannot be denied that the net cost of the transportation to users of leased and rented cars is reduced by the amounts received in excess of the costs to them and that they are thereby removed from that absolute level of equality with other shippers which the statute was enacted to establish and that the purpose of the legislation is defeated."

The El Dorado Company claims to be entitled to reap this profit out of the use of the privately owned cars, but it is for the Commission to determine whether the shipper may enjoy such profit without violation of law. We need not debate the merits of the issue. It is enough that the

Commission has determined, upon evidence which admitted of no different determination, that the prohibitions of the law against rebates and concessions and preference and discrimination would be set at naught if shippers favored by particularly advantageous car-leasing agreements were permitted to enjoy the substantial profits represented by the excess of car mileage earnings over car rental and other expenses.*

It is not material that the freight charges may have been paid by the consignees (Appellants' Brief, p. 16). The Commission properly disposed of that contention in its report (R. 244-245).

Northern Central Ry. Co. v. United States, 241 Fed. 25 (1917);

Elgin, J. & E. Ry. Co. v. United States, 253 Fed. 907, 911 (1918);

Ohio Tank Car Co. v. Keith Railway Equipment Company, 148 Fed. (2d) 4 (1945).†

---

*The annual reports of the Commission over the years clearly disclose its continuing concern with the problem of private cars and its determination to eliminate concessions and discriminations resulting from their use. In its annual report for 1893 the Commission dealt at length with "*Payment of Car Mileage for Use of Private Cars*" (pp. 60 et seq.) and referred to the "many discriminations" resulting from the practice (p. 66). In its annual report for the year 1903 the Commission again emphasized the "*Evils Resulting from the Use of Private Cars*" (p. 22 et seq.). Speaking particularly with respect to the use of stock cars, the Commission said, *inter alia:* "it is charged to have been the practice of the concerns owning such cars to divide with the shippers the mileage received from the railroad companies, *a practice which operated to the same effect as the payment of rebates to such shippers* * * *." (p. 24)

See also Third Annual Report for 1889, pp. 18, 108; Seventh Annual Report for 1893, pp. 60-67; Seventeenth Annual Report for 1903, pp. 22-26; Nineteenth Annual Report for 1905, pp. 10, 11; Twentieth Annual Report for 1906, p. 48; Fifty-fourth Annual Report for 1940, p. 74.

†Certiorari denied by this Court October 8, 1945.

The Commission's determination is within its administrative authority, as expressly declared by this Court, and, being supported by substantial evidence, is conclusive.

It is worthy of note that the conclusion so reached by the Commission is in strict accord with the current of authority evidenced by decisions in other cases of cognate character.

Interstate Commerce Commission v. Reichmann, 145 Fed. 235 (1906).*

Spencer Kellogg & Sons, Inc. v. United States, 20 Fed. (2d) 459 (1927);

Ohio Tank Car Co. v. Keith Railway Equipment Company, 148 Fed. (2d) 4 (1945).†

We are familiar with no ruling of Court or Commission of contrary import.

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*Cited with approval in a foot-note to the opinion of this Court in *Union Pacific Railroad Company, et al. v. United States*, 313 U.S. 450, 463 (1941).

†Certiorari denied by this Court October 8, 1945.

III.

AN ADMINISTRATIVE ORDER OF THE COMMISSION IS SUBJECT TO JUDICIAL REVIEW TO THE EXTENT ONLY OF DETERMINING WHETHER THE ORDER IS WITHIN THE SCOPE OF THE COMMISSION'S AUTHORITY AND THE BASIC PREREQUISITES OF PROOF HAVE BEEN SATISFIED.

The Court is not an appellate administrative tribunal. The scope of review permitted to the Court is definitely limited. As this Court said in

United States v. New River Company, 265 U.S. 533, 542 (1924):

> "The courts will not review determinations of the Commission made within the scope of its powers, or substitute their judgment for its findings and conclusions."

In the more recent case of

Rochester Telephone Corporation v. United States, 307 U.S. 125, 139-140 (1939),

it was held:

> "Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable."

There are many other decisions to the same effect but it will be unnecessary to cite them. Beyond question the Commission has acted within the scope of its constitutional and statutory power. This Court has ruled that this issue is administrative in character and that it is within the

competence of the Commission. Certainly also the basic prerequisites of proof have been satisfied. The order is therefore incontestable and a reviewing court will not substitute its judgment for the judgment of the Commission.

CONCLUSION

We have stated that, in the view of this appellee, the only issue presented upon this appeal is the issue of jurisdiction. If the review may be extended to comprehend the merits, it is clear that

(1) The Commission has determined the administrative question formulated by this Court and raised in the petition filed with the Commission by the El Dorado Company;

(2) The Commission's determination is "within the competence of the Commission," as declared by this Court;

(3) A full and adequate hearing was afforded;

(4) The Commission's findings and conclusions have full record support;

(5) The Commission's determination of the administrative question is final and conclusive.

The final decree of the District Court should be affirmed.

Respectfully submitted,

(Signed) W. S. HEFFERAN, JR.,
(W. S. Hefferan, Jr.)
135 South LaSalle Street,
Chicago 90, Illinois.

(Signed) KENNETH F. BURGESS,
(Kenneth F. Burgess)

(Signed) DOUGLAS F. SMITH,
(Douglas F. Smith)
11 South LaSalle Street,
Chicago 3, Illinois.

(Signed) ALLAN P. MATTHEW,
(Allan P. Matthew)
1500 Balfour Building,
San Francisco 4, California.

Attorneys for General American Transportation Corporation, Appellee.

(Signed) SIDLEY, AUSTIN, BURGESS & HARPER,
(Sidley, Austin, Burgess & Harper)
11 South LaSalle Street,
Chicago 3, Illinois.

(Signed) McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE,
(McCutchen, Thomas, Matthew, Griffiths & Greene)
1500 Balfour Building,
San Francisco 4, California.

Of Counsel.

Dated at San Francisco, California,
January 23, 1946.

(APPENDIX FOLLOWS)

APPENDIX

STATUTORY PROVISIONS INVOLVED

Elkins Act, Sec. 1, pars. 1 and 2:

"That * * * it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars; *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. * * *"

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act." Act of Feb. 19, 1903, 32 Stat. 847, c. 708, as amended by Act of June 29, 1906, 34 Stat. 587, c. 3591; 49 U.S.C., Sec. 41(1) and (2).

Interstate Commerce Act, Sec. 15(13):

"If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like

manner as the orders above provided for under this section." Act of June 29, 1906, 34 Stat. 590, c. 3591, as amended by Act of June 18, 1910, 36 Stat. 553, c. 309, and by Act of Feb. 28, 1920, 41 Stat. 488, c. 91; 49 U.S.C., Sec. 15(13).

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 428

EL DORADO OIL WORKS AND EL DORADO TERMINAL COMPANY, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND GENERAL AMERICAN TRANSPORTATION COMPANY, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted district court (R. 33–36) is reported in 59 F. Supp. 738. The report of the Interstate Commerce Commission (R. 237–255) appears in 258 I. C. C. 371.

JURISDICTION

The final decree of the district court was entered on April 9, 1945 (R. 40). The petition for appeal was filed on June 1, 1945, and the appeal

was allowed on the same day (R. 41). Probable jurisdiction was noted on October 15, 1945 (R. 267). The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (28 U. S. C. 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (28 U. S. C. 345).

QUESTIONS PRESENTED

Whether the three-judge district court had jurisdiction to review the Interstate Commerce Commission's action upon questions arising in an ordinary action in assumpsit, the questions having been held by this Court to be questions committed to the Commission's administrative judgment.

A subordinate question is whether the Commission proceeded upon a misconception of the questions this Court submitted to it and which this Court expected it to determine.

STATUTES INVOLVED

The pertinent statutory provisions involved are set forth in the Appendix, *infra*, pp. 40–43.

STATEMENT

This is a direct appeal from the final decree of a specially constituted District Court for the Northern District of California, dismissing a suit brought by the appellants to set aside certain action of the Interstate Commerce Commission.

The action was taken by the Commission in *Allowances for Privately Owned Tank Cars*, 258 I. C. C. 371 (R. 237), which proceeding was instituted in response to this Court's decision in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, to determine the lawfulness of certain practices with reference to the rental of tank cars.

Appellant El Dorado Terminal Company is a wholly owned subsidiary of appellant El Dorado Oil Works (hereinafter called the Oil Works), which is a corporation engaged in processing coconut oil from copra in plants at Berkeley and Oakland, California, and shipping the product in tank cars in interstate commerce. The General American Transportation Corporation (hereinafter called the Car Company) is a "private car line" rather than a common carrier and is the owner of numerous railroad cars, including tank cars, which it rents or leases to various shippers for the transportation of their products. (R. 238.)

On September 28, 1933, the Car Company and the Oil Works entered into an agreement under which the former leased to the Oil Works 50 tank cars, designated as "permanent" cars, at a rental of $27.50 per car per month. This lease, a renewal of a previous one, was for the three-year period from January 1, 1934, to December 31, 1936. The Car Company agreed to supply the Oil Works with such additional tank cars as it might need for the shipment of its products,

these additional cars to be ordered by the Oil Works from the Car Company from time to time, as needed. The rental for the additional cars was at the rate of $30 per car per month for the time such cars were in the service of the Oil Works. (R. 52–57.)

The agreement provided that the Car Company would collect from the railroads all mileage earned by the cars covered by the agreement and "each month credit to the rental or service account" of the Oil Works "all mileage earned by said cars while in the service of the Oil Works "according to and subject to all rules of the tariffs of the railroads" (R. 55–56).

The tariffs of the railroads, though publishing a general provision for the payment of 1½ cents per car per mile, both loaded and empty, for the use of tank cars of private ownership, contained rules governing the application of the provision which precluded payment of the mileage to the Oil Works under the circumstances of this case. The rules, in effect throughout the period here in question, provided *inter alia* that the mileage would be paid only to the "party" whose "reporting marks" appeared on the cars. (R. 110.) It was specially provided in the agreement that all the cars covered thereby should bear the reporting marks of the Car Company (R. 52). The mileage was not, therefore, under the terms of the tariff, payable to the Oil Works.

The terms of the agreement were observed for a period of approximately six months or until

July 2, 1934, on which date the Commission rendered its decision in *Use of Privately Owned Refrigerator Cars,* 201 I. C. C. 323, 378–381, in which it held that the payment in whole or in part to shippers of mileage allowances by railroads, either directly or through car owners, in excess of the amount of rental such shippers pay for the use of the cars and other actual expenses in connection therewith, results in such shippers receiving transportation of their products at lower rates than those paid by shippers generally who use cars furnished by the carriers, and at less than the published rates (R. 239).

After the issuance of this decision by the Commission, the Car Company refused to credit or pay over to the Oil Works any part of the mileage allowances in excess of the rental reserved in the lease. Until that time the practice had been for the Car Company to collect the mileage, deduct the rental due, and pay the balance to the Oil Works. Thereafter, the Car Company collected the mileage from the railroads, credited the Oil Works with the amount of the rental due, and retained the balance, refusing to pay it over to the Oil Works on the ground that if it did so it would be the instrumentality for the granting of unlawful concessions or rebates to the Oil Works. It appears that both before and after the change in the practice, the aggregate of the mileage earnings each month exceeded the rental due from the Oil Works. Throughout the entire

period, therefore, the Oil Works paid nothing to the Car Company for the use of the cars. (R. 234, 239.)

In June 1935, the El Dorado Terminal Company, as assignee of the Oil Works (its parent company), brought suit against the Car Company in the United States District Court for the Northern District of California to recover the unpaid excess mileage earnings which had accrued from the use of the leased cars up to May 31, 1935. The amount claimed was $18,532.78. Judgment for the Car Company was rendered by the district court, but was reversed on appeal by the Circuit Court of Appeals, which held (104 F. 2d 903) that the Terminal Company was entitled to the full amount claimed. This Court granted certiorari and subsequently held in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, that the "question of the reasonableness and legality of the practices of the parties was subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission," and that "when it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act." The judgment of the Circuit Court of Appeals was reversed and the cause remanded to the District

Court to be there held "pending the conclusion of an appropriate administrative proceeding" by the Commission (308 U. S. at p. 433). (R. 239–240.)

Pursuant to a petition subsequently filed with it by the Oil Works and its assignee (R. 43–52), the Terminal Company, the Commission instituted an investigation to determine (258 I. C. C. 371, 374):

> (1) whether the practices involved under the terms and operations of the lease contract are unlawful in violation of the Interstate Commerce Act;
>
> (2) whether a reasonable charge or allowance may be paid, and, if so, the amount thereof as a maximum to be paid, by the carrier or carriers by railroads for the use of the tank cars furnished such carriers by petitioners for the transportation of the products of petitioners in interstate commerce from Berkeley and Oakland, Calif., in the period January 1, 1934, to December 31, 1936; and
>
> (3) what findings shall be made, or what rules, regulations, or practices shall be prescribed, or what orders shall be entered, to remove any unlawfulness that may be found to exist. (R. 58.)

Numerous common carriers by rail were made respondents in the proceeding (see R. 241). Following a hearing (R. 59–233), in which the said respondents and the Car Company participated,

the Commission issued its report (R. 237–255). The Commission therein reviewed the action of the courts, considered in the light of the record made in the administrative proceeding the reasonableness and legality of the practices involved, and made findings in respect thereof, all in compliance with the direction of the Supreme Court in the *El Dorado Terminal Co.* case that the Commission's administrative judgment in the premises be obtained. At the conclusion of its report the Commission discontinued the proceeding after stating its conclusions as follows (258 I. C. C. at pp. 380–381):

> (1) That the rental paid or to be paid by El Dorado Oil Works to General American Tank Car Corporation [now the General American Transportation Corporation] under the terms of the lease agreement between those parties, dated September 28, 1933, was the only cost incurred by the former in furnishing the tank cars in which its shipments moved. A just and reasonable allowance as a maximum to have been paid by the respondents, rail carrier or carriers, to the Oil Works for the furnishing of such cars would have been an amount not to exceed such rental. Such an amount and allowance has been paid to the Oil Works through credits made to the account of the Oil Works by the Tank Car Corporation.
>
> (2) That an allowance to the Oil Works by the respondents, rail carrier or carriers,

or by the Tank Car Corporation, under the agreement, in excess of said rental would be unjust and unreasonable, and would unduly prefer the Oil Works as a shipper of its commodities transported by it in the tank cars herein involved. The amount paid by the Tank Car Corporation to the Oil Works prior to July 1, 1934, under the terms of the agreement, to the extent it was in excess of the rentals due thereunder, was unjust and unreasonable, and unduly preferred the Oil Works as a shipper of its commodities.

(3) That the Oil Works is entitled to no allowance from the respondents, rail carrier or carriers, directly or through the Tank Car Corporation, for the special cleaning and preparation of the tank cars during the period of the agreement, January 1, 1934, to December 31, 1936. (R. 249–250.)

Appellants thereupon brought this suit under the Urgent Deficiencies Act; they assumed and contended that the findings of the Commission, above described, coupled with its order discontinuing the proceeding (R. 260–261), constituted an "order" within the meaning of that Act[1] and asked that the same be enjoined and set aside on the grounds, primarily, of lack of substantial evi-

[1] Three-judge district courts (28 U. S. C. 47) have jurisdiction of "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission" (28 U. S. C. 41 (28)).

dence. The United States and the Commission defended on the merits, but also insisted that the District court, specially constituted as a court of three judges, was without jurisdiction. In dismissing the complaint, the three-judge court sustained the latter contention, saying in part (R. 35–36) that—

> By its finding and determination with respect to the practice here involved, the Interstate Commerce Commission made no decision which required any party to the proceeding before it to do or not to do any specific act. It followed the directions of the Supreme Court (*General American Tank Car Corp.* v. *El Dorado Terminal Co., supra* [308 U. S. 422]) and determined, under the Interstate Commerce Act, the lawfulness and reasonableness of the practice which had obtained between plaintiff and the tank car company. When this was done, its job was done. It was not required to make any order and made none, and having completed its work, stamped "finis" thereon and discontinued the proceeding. Hence there is no order, in the sense contemplated in the statute, requiring review by this court (*U. S.* v. *Griffin*, 303 U. S. 226, 233; *U. S.* v. *Ill. Central R. R. Co.*, 244 U. S. 82; *D. & H. Co.* v. *U. S.*, 266 U. S. 438; *U. S.* v. *L. A. Ry. Co.*, 273 U. S. 299.) [2]

[2] None of these four cases was overruled by *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. See 307 U. S. at pp. 130, 131, 135; see also *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 301; *Chicago & North West-*

Past transactions between plaintiff and defendant constitute the subject matter of the assumpsit action now pending in the District Court. This is not a case of a presently existing practice declared unlawful by the Commission. Consequently there does not arise the right to apply for the equitable or injunctive relief provided by the statute to protect against irreparable damage.

The procedure specified by the Supreme Court in *General American Tank Car Corp.* v. *El Dorado Terminal Co., supra,* has been followed. The administrative practice involved has been passed upon by the Interstate Commerce Commission. The parties may now proceed in the assumpsit action. Therein, in our opinion,

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ern Ry. Co. v. *United States*, 320 U. S. 718. An excerpt from Mr. Justice Brandeis' opinion in the *Griffin* case is particularly relevant (303 U. S. at p. 233):

"In the opinion of Congress jurisdiction with the extraordinary features of the Urgent Deficiencies Act was justified by the character of the cases to which it applied—cases of public importance because of the widespread effect of the decisions thereof. In such cases Congress sought to guard against ill-considered action by a single judge and to avert the delays ordinarily incident to litigation. In construing the Act, this Court concluded that despite the broad language used in the Commerce Court Act, Congress could not have intended to include in this special jurisdiction suits to set aside every kind of order issued by the Commission. For substantially every decision, and every other kind of action by the Commission is expressed in, or is followed by, an order; and many of the orders are obviously not of such public importance and widespread effect as to justify, in cases affecting them, the extraordinary features of the Urgent Deficiencies Act."

> the court may determine plaintiff's cause and upon tender thereof, any competent defenses thereto.

Earlier in its opinion, the court below pointed to the fact that the procedure specified by this Court was not new (R. 34). Following its statement that the *El Dorado Terminal Co.* case (308 U. S. 422) held that the one-judge court in the assumpsit action should have stayed its hand until the Commission had passed on the administrative question involved, the court below said, "In so holding, the Supreme Court followed a like procedure which it earlier had invoked in *Mitchell Coal & Coke Co.* v. *Penna. R. Co.*, 230 U. S. 247" (R. 34).

SUMMARY OF ARGUMENT

A. The three-judge district court correctly ruled that its jurisdiction under the Urgent Deficiencies Act over suits to enjoin and set aside orders of the Commission did not extend to the suit brought by appellants to enjoin the action of the Commission here involved. The special injunctive jurisdiction under the Urgent Deficiencies Act applies to orders of the Commission only (28 U. S. C. 41 (28)) and not to the enjoining of mere findings and conclusions reached by the Commission. Here the Commission's action consisted of findings and conclusions and an order simply discontinuing its proceeding. Such an order is merely a procedural step indicating the closing of docket. This is shown

both by its phraseology and by the fact that it cannot, compatibly with the Commission's findings and the subject matter involved, be regarded as an order of dismissal or other "negative order." The Commission's findings here are neither adapted to nor intended for carrying out by orders of its own and no such order was made.

While, in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, this Court held that there were questions involved in the assumpsit action which had to be determined by the Commission, it further held that the single-judge court before which the action was pending had jurisdiction of the subject matter—the lease agreement—and of the parties. The Commission's action in determining the questions referred to it was merely an ancillary step in the assumpsit case and did not constitute a reviewable order. The Commission did only what was needed to enable the court to perform its functions, and there is no reason for treating the Commission's action as an order.

As pointed out by this Court in the *El Dorado Terminal Co.* case, the situation here is like that involved in *Mitchell Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, where, in connection with the question of reasonable allowances arising in a lawsuit, this Court held that the question was one for the Commission. Referring to that case, this Court said, "There should not be a dismissal, but, as in *Mitchell Coal Co.* v. *Pennsylvania R. Co.*,

supra, the cause should be held pending the conclusion of an appropriate administrative proceeding. Thus any defenses the petitioner [Car Company] may have will be saved to it." (308 U. S. at p. 433.) From this latter statement, it would appear that the Car Company might urge in defense in the assumpsit action the usual grounds for review of administrative determinations, namely, that the Commission's determinations are beyond its authority and without support of adequate findings and evidence.

The decisions in *Shannahan* v. *United States*, 303 U. S. 596, and in *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, taken together, show both that the Commission's mere findings and determinations are not reviewable under the Urgent Deficiencies Act and that the proper place for their review is in the court where the questions determined are in issue.

B. Contrary to the contentions of appellants, the Commission, in determining the question of reasonable allowances due the Oil Works for cars furnished the carriers in the past rather than the question of reasonable allowances for the future to be published in the carriers' tariffs, did not proceed under a misconception either of its statutory authority or of what was expected of it by this Court. In those portions of its *El Dorado Terminal Co.* opinion dealing particularly with the administrative questions involved in the assumpsit action, this Court obviously was speaking

of the question of allowances due the Oil Works for past transactions.

The appellants, in insisting that the Commission could only prescribe allowances for the future and that such action was what was expected of it by this Court, contend that the question of the lawfulness of allowances for the past was a judicial question for the courts, and, therefore, that this Court's opinion could not mean that the latter question was for the administrative judgment of the Commission. In referring to the question committed to the Commission, the Court makes entirely plain that the source of the Commission's jurisdiction was the authority lodged with it under the Interstate Commerce Act to guard against rebates by determining the maximum reasonable allowances payable to shippers out of the rates. Section 15 (13) (Appendix, *infra*, p. 41).

ARGUMENT

THE DISTRICT COURT CORRECTLY RULED THAT THE COMMISSIONS ACTION DID NOT CONSTITUTE AN ORDER REVIEWABLE UNDER THE URGENT DEFICIENCES ACT

A. THE ACTION OF THE COMMISSION WAS MERELY AN ANCILLARY STEP IN THE PENDING ASSUMPSIT CASE AND WAS REVIEWABLE ONLY BY THE ONE-JUDGE DISTRICT COURT

The action of the Interstate Commerce Commission in the investigation conducted by it pursuant to the decision in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422,

was, we submit, merely an ancillary step in the pending action of assumpsit brought by the Oil Works against the Car Company. This Court directed that the assumpsit court should stay its hand pending a determination by the Commission of the administrative question as to the amount, if any, of the allowance to be paid to the Oil Works as reasonable compensation for facilities supplied by it to the carrier. The Commission, in making its determination that the maximum permissible allowance would be the cost of renting the cars from the Car Company and that any allowance in excess thereof would constitute an unjust preference or rebate, was simply facilitating the conduct of the assumpsit action by performing a task referred to it in the course of the pending lawsuit.

In the *El Dorado Terminal Co.* case, this Court held that, the action being one in assumpsit on a written instrument, the lease agreement, the single-judge district court had jurisdiction of the subject matter and of the parties. While the money for which the Oil Works sued was not in the custody of the court, it was, nevertheless, money which the court, because of its jurisdiction over the agreement and the parties, could reach by its judgment or orders, whereas the Commission could not. The Commission could aid the court by determining the reasonable amount of allowance to which the Oil Works was entitled for the cars it had furnished the railroads in connection with its shipments.

But it is clear that the Commission did not itself undertake to give effect to its determination and findings by making any order requiring the payment of money, or the performance of any other act, either by the Car Company or by the carriers. Nothing purporting to give effect to that determination or those findings is contained in the Commission's order discontinuing the proceedings.[3] That order, as its phraseology discloses, was merely a procedural step indicating that the docket was closed. Since all that was required of the Commission, in order to enable the court in the assumpsit action to exercise its jurisdiction and perform its functions, was that the Commission determine the lawfulness of the prac-

[3] The order reads as follows (R. 260–261):

"*It appearing*, That by order dated July 24, 1940, the Commission, in response to a joint petition filed by El Dorado Oil Works and El Dorado Terminal Company, instituted and [an] investigation to determine the lawfulness of the practices under the terms of a contract dated September 28, 1933, between the El Dorado Oil Works and the General American Tank Car Corporation, and the reasonableness of the allowance to be paid by carriers by railroad for the use of tank cars furnished such carriers by the El Dorado Oil Works for the transportation of its products in interstate commerce during the period from January 1, 1934, to December 31, 1936:

"*It further appearing*, That a full investigation of the matters and things involved has been had, and that the parties have been fully heard, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"*It is ordered*, That the proceeding be, and it is hereby, discontinued."

tices and the just and reasonable allowance, if any, due the shipper, there is no occasion or reason for treating the findings and determinations as an order reviewable under the Urgent Deficiencies Act, rather than action in aid of the single-judge assumpsit action. As the court below said, the Commission "was not required to make any order and made none" (R. 35).

While the appellants do not expressly concede that, if all that was required of the Commission and all that it did was to make administrative determinations of the ancillary sort just described, its action would not be reviewable under the Urgent Deficiencies Act (Br. 9–12), their principal argument is apparently that the determinations made by the Commission were not simply ancillary administrative determinations and that they were not the determinations which the Court expected and the statute authorized the Commission to make (Br. 13–17).

As grounds for setting aside the Commission's determinations the appellants assert, *inter alia*, that the determinations are confiscatory and beyond the Commission's statutory authority (R. 4, Br. 14, 15). However, since, as held by the court below, the action taken by the Commission was that specified by this Court in the *El Dorado Terminal Co.* case and was merely an ancillary step in the assumpsit action, the logical and intended forum for the review thereof was the single-judge court before which the assumpsit action was pending.

As shown by the decisions cited in the opinion below, the jurisdiction conferred on three-judge district courts by the Urgent Deficiencies Act (28 U. S. C. 47) was designed for judicial review only of the Commission's orders of real substance. Although the jurisdiction conferred in terms covers suits to enjoin "any order of the Interstate Commerce Commission" (28 U. S. C. 41 (28)), such jurisdiction has not only been held not to extend to mere findings and determinations in a report of the Commission (*United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522; *Shannahan* v. *United States*, 303 U. S. 596) but also not to be applicable to all orders of the Commission, it having been pointed out (*United States* v. *Griffin*, 303 U. S. 226, 233) that practically every step taken by the Commission is preceded by the words "it is ordered."

It is true that "negative orders" such as were involved in *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, constitute the largest class of orders which in the past have been held not to be reviewable and that the doctrine that such orders are not reviewable has been overturned. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 142; *United States* v. *Maher*, 307 U. S. 148. However, the decision in the *Rochester Telephone Corp.* case applies only to "negative order" cases and, in fact, expressly distinguishes (p. 130) such cases as *United States* v. *Illinois Cent. R. R. Co.*, 244 U. S. 82; *United States* v. *Los*

Angeles R. R. Co., 273 U. S. 299; and *Shannahan* v. *United States*, 303 U. S. 596.

The order of discontinuance here involved simply indicates that the docket was closed and is an order of no more force and effect than the notice (termed an order) of hearing involved in *United States* v. *Illinois Cent. R. R. Co.*, 244 U. S. 82. Such order cannot, compatibly with the Commission's findings and the subject matter involved, be regarded as an order of dismissal or other "negative order" such as is now reviewable under the three-judge court rule. While, as held by this Court in the *El Dorado* case, the shipper here was entitled to a reasonable allowance, the emphasis laid by the Court, and by the Commission throughout, is on the Interstate Commerce Act's requirement (sec. 15 (13)) that such allowance shall not amount to excessive compensation to the shipper and thus constitute an illegal rebate. It is to the prevention of this that the Commission's findings are directed. If the Commission had intended to give effect thereto by an order of its own, directed either to the parties to the agreement, or to the carriers, such order would not have been one merely discontinuing the proceeding but would have been an order which, conformably to the issues and the findings, would have affirmatively forbidden the payments called for by the agreement, and required adjustment to the basis of the maximum amount of allowances to which the Commission found the shipper to be lawfully entitled.

It is evident that the Commission's findings were neither adapted to, nor intended for, carrying out by orders of its own, whether affirmative or negative. Although the Commission, by its findings, authoritatively fixed the reasonable amount of allowance payable to the shipper Oil Works, it was without authority to enter affirmative orders directing the payment thereof either by the Car Company or by the carriers. The Car Company was not subject to the Commission's authority in any respect. See the *El Dorado Terminal Co.* case, 308 U. S. at p. 428. An order directing the carriers to pay the reasonable allowance found due was equally beyond the Commission's authority, for, even if the shipper's petition to the Commission were to be regarded as a complaint asking for an award of reparation, the period of time within which such a complaint could be filed had long since lapsed.*

The shipper's petition to the Commission was not a complaint invoking the Commission's au-

* Since, as held in the *El Dorado Terminal Co.* case, 308 U. S. at p. 431, it was the shipper (the Oil Works) and not the Car Company, which furnished the cars to the railroads, the shipper might (except for its agreement with the Car Company) have complained to the Commission and sought an award of damages (sec. 8 of the Interstate Commerce Act; see also *Paragron Ref. Co.* v. *Alton & S. R. R.*, 118 I. C. C. 166, 168). The time within which such a complaint may be filed is limited to two years (sec. 16 (3) (b)), and such provision of Section 16 "is not a mere statute of limitation but is jurisdictional." *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638, 642. Here the petition was not filed until 1940 although the cause of action accrued in 1934.

thority independently of the action in assumpsit in the district court. The shipper (Oil Works) was a party to the lease agreement with the Car Company and, based on the agreement, it brought the action in assumpsit. The bringing by the shipper of a lawsuit to recover the mileage allowances to which it claimed to be entitled negates any possibility that its petition to the Commission was a complaint for recovery directly through the Commission upon its claim for the same mileage allowances. In any event, it is evident on the face of the pleadings that the shipper's petition to the Commission (258 I. C. C. at p. 373) was not an independent complaint, but was filed responsive to this Court's holding and instructions in its decision on certiorari in the court action in assumpsit brought by the shipper. See the *El Dorado Terminal Co.* case, 308 U. S. at p. 433.

As already stated, this Court, on certiorari in the assumpsit action in the *El Dorado Terminal Co.* case, held that the district court had jurisdiction of the lease agreement and of the parties. The Court's only qualification was that the district judge should have stayed his hand until the Commission had passed on the administrative questions involved. "There should not be a dismissal," the Court said, "but, as in *Mitchell Coal Co.* v. *Pennsylvania R. Co., supra* [230 U. S. 247], the cause should be held pending the conclusion of an appropriate administrative proceeding. Thus any defenses the petitioner [Car Company]

may have will be saved to it." (See the *El Dorado Terminal Co.* case, 308 U. S. at p. 433.) In the *Mitchell Coal* case, 230 U. S. 247, the Supreme Court expected the Commission only to make a determination or "ruling as to the reasonableness of the practice and the allowance involved" (*ibid.*, p. 267), and the Commission, in responding thereto, made such a ruling apparently without an accompanying order. *Mitchell Coal & Coke Co.* v. *Penna. R. R. Co.*, 38 I. C. C. 40, 50. Thereafter, the case did not require further resort to the district court, but, if it had, the language at the end of this Court's decision (230 U. S. at p. 267) shows that the defendant would have had "the right to be heard on its plea of the statute of limitations as of the time the suit was filed and any other defense which it may have." Under this language it would seem that the defendant, in such case, might have urged in defense the usual grounds for review of administrative determinations, *viz.*, that the Commission's ruling was beyond its authority, without support in the evidence or otherwise arbitrary.

It was clearly recognized in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 132, and *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407, 415, that a suit cannot be maintained under the Urgent Deficiencies Act unless the complaint states a cause of action in equity. It is elementary that the requisites of equity jurisdiction are lacking where there is

an adequate legal remedy, or where the complainant is not faced with any immediate threat of interference with its rights. This Court's opinion in the *El Dorado Terminal Co.* case seems to imply that the same limited review of the Commission's action ordinarily obtainable before a three-judge court should be obtainable with respect to the instant "order" in the pending proceedings at law before a single judge, for it stated that "any defenses the petitioner [Car Company] may have will be saved to it." The Court said, too, that the one-judge proceeding should be held up "pending the conclusion of an appropriate administrative proceeding," apparently indicating that, once the Commission reported, only the one-judge court was to proceed. (See 308 U. S. at pp. 432–433.) As in *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, we believe that the present action of the Commission is reviewable only in the one-judge proceeding. Since the appellants would have an adequate remedy through a review of the Commission's action in the one-judge proceeding and since the Commission's action here cannot pose an immediate threat to appellants' rights until the one-judge court has passed upon its validity, the appellants have failed to satisfy the conventional requirements of equity jurisdiction.

In *United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522, this Court pointed out that the Commission had various duties and functions,

which, while "calling" for findings and determinations, did not "call" for orders, and, although the Court did not specifically refer to situations of administrative rulings necessary to lawsuits, such situations fall clearly within the same principles. The decisions in *Shannahan* v. *United States*, 303 U. S. 596, and in *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, taken together, show both that the Commission's mere findings and determinations are not reviewable under the Urgent Deficiencies Act and that the proper place for their review is in the court where the questions determined are in issue. Accordingly, we maintain that the Commission's action here can be reviewed only in the one-judge district court trying the assumpsit action.

B. THE ACTION OF THE COMMISSION DID NOT CONSTITUTE A DECISION OF THE ASSUMPSIT CASE AND A USURPATION OF JUDICIAL FUNCTIONS

As is shown by this Court's decision in the *El Dorado Terminal Co.* case, the questions arising in the action in assumpsit and committed to the Commission involve basically the provisions of Section 15 (13) of the Interstate Commerce Act (Appendix, *infra*, p. 41), whereby authority is placed with the Commission to determine after hearing questions as to what constitute just and reasonable allowances payable to shippers furnishing services or instrumentalities in connection with their shipments. While the appellants recognize apparently that this is the statutory provi-

sion particularly pointed to in the *El Dorado Terminal Co.* case as entitling the shipper to allowances and as committing to the Commission the question as to the just and reasonable amount thereof (Br. 13, 15), they nevertheless seem to contend that this Court was there referring to the question of the proper amount of future allowances[5] and not the question involved in the assumpsit action of the lawfulness of the allowances for past transactions (see Br. 15, 16). They urge that the only authority lodged with the Commission by Section 15 (13) is over questions as to future allowances; that questions as to allowances for the past are judicial questions for the courts and made such by the Elkins Act; that this was recognized in the assumpsit action, because the only defense therein advanced by the Car Company was one raising issues under the Elkins Act[6] and because this Court held (308 U. S. 422) that the single-judge district court had jurisdiction of the assumpsit action; and that, while this Court further held that the district court should have stayed its hand pending determination by the Commission of the administra-

[5] The appellants' petition (R. 43–52) to the Commission neither made such contention nor asked the Commission to prescribe allowances for the future (see 258 I. C. C. at p. 373).

[6] The Car Company's defense was that, if it were to pay over to the Oil Works the full amount of allowances provided for in the lease agreement, it would be the instrumentality for the granting of rebates in violation of Section 1 of the Elkins Act (Appendix, *infra*, pp. 41–43).

tive question involved in the application of Section 15 (13); it did not intend to submit to the Commission the determining of such questions as the lawfulness of allowances for past transactions. Accordingly, the appellants insist that the action of the Commission was not merely an ancillary administrative step in the assumpsit action but, instead, constituted a decision of that action and usurpation of the judicial functions of the judge before whom it was pending. (See Br. 5, 11, 13, 15.)

In the *El Dorado Terminal Co.* case (308 U. S. at p. 429), this Court explained that shippers requiring a specialized form of freight car for transportation of their products frequently rent the cars from car companies and then furnish them to the railroads. For so supplying the cars used in transporting its products, a shipper is entitled to an allowance from the railroads out of the rates which it pays for the transportation. Any such allowance which would more than compensate the shipper for the expense to which he is put would result in his obtaining transportation at lower cost than shippers generally under the rates and thus amount to a rebate.[7] Section 15 (13) of the Interstate Commerce Act (Appendix, *infra*, p. 41), while authorizing allowances

[7] The significance of a provision requiring a hearing by the Commission as showing Congress' intention to commit a question to the Commission rather than to leave it with the courts is shown in *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 181–182.

to shippers furnishing services or instrumentalities in connection with their shipments, specially provides that such allowances "shall be no more than just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers * * *." (See 258 I. C. C. 371, 378.)

In *In re Private Cars*, 50 I. C. C. 652, the Commission, following a general investigation into the practice whereby shippers requiring special types of freight cars obtained and furnished such cars for the transportation of their products, found that the practice was not unlawful but worked to the benefit both of shippers and carriers. In connection with privately owned tank cars so furnished to the railroads, the Commission therein prescribed as compensation to the shipper an allowance of 1 cent a mile. As the report in that case shows, this allowance was based on the average cost of car ownership, consisting of such fairly consistent items as interest on investment, depreciation and the like.[8] In its later report in the

[8] In its report in the present case (258 I. C. C. at p. 379), the Commission refers to its report in *In re Private Cars*, 50 I. C. C. 652, saying we there "found that a reasonable allowance for the use of privately owned tank cars would be 1 cent a mile. The figure was based on the average cost of car ownership. In that proceeding the car owners conceded that they were not properly entitled to make a profit on their cars used by the carriers. They demanded, as a rule, that the entire cost to them, together with interest on their investment, should be covered by payment for their use. * * *"

Refrigerator Car Case, 201 I. C. C. 323, the Commission gave particular consideration to the shipper-lessees of cars[9] and pointed out that the rentals charged by the car companies, which are the principal costs of the shippers in connection with the cars, varied greatly, being governed by no principle or rule except that of the severe competition between the car companies. Because of these conditions and others, including the showing that the rentals are "usually fixed sufficiently low so that the mileage earnings [either paid directly, or through the car companies, to the shippers] will exceed the cost to shippers" (201 I. C. C. 323, 381), the Commission found that such payment of allowances to shipper-lessees in effect constituted rebates or concessions from the published rates and it condemned the payment to or "receipt by shipper-lessees of car-mileage allowances in excess of their actual costs, as reflected by their rental payments to the car-owning companies."

In the present case, the Oil Works leased only 50 cars, these being designated as "permanent" cars and the rental called for being $27.50 per car per month. The Car Company, however, agreed to supply such additional cars as the Oil

[9] In *In re Private Cars*, 50 I. C. C. 652, the Commission gave its approval generally to the use by the railroads of cars furnished by the shippers whether the cars were owned by the shippers or leased from the car companies, but the record, apparently, did not disclose the practices in connection with shipper-leased cars which are described in the later *Refrigerator Car Case*, 201 I. C. C. 323.

Works might from time to time need, the rental for these being at the rate of $30 per car per month for the time such cars were in the service of the Oil Works. (See Statement, *supra*, pp. 3–4.) Such an arrangement for a supply of additional cars with rentals based only on the time the cars are in the service of the shipper enables the limiting of the number of permanent cars the shipper would otherwise have to lease to meet its needs and pay for at fixed monthly rentals.[10] It is this, particularly as coupled with a low, competitively-induced basis of rentals, that may result in a "shipper-lessee" receiving concessions from the rates where, as here, the allowances paid to it for furnishing the cars to the railroads bear no relation to its costs in obtaining the cars as reflected by its rental payments.

In the case of the "shipper-lessee" here (the Oil Works), the possibility that the arrangements might have had the above result was recognized by this Court's statement in the *El Dorado Terminal Co.* case, 308 U. S. at p. 432, that "as, upon the face of things as disclosed by this record, the shipper is apparently reaping a substantial profit from the use of the cars, a clear case is

[10] In contrast to this, a "shipper-owner" (a shipper depending upon cars of its own ownership) must own not only as many cars as the ordinary needs of its business require, but, in addition, a sufficient number to meet its maximum needs, with the attendant costs of ownership, including maintenance, taxes, depreciation, and the loss of mileage whenever any of the cars stand idle.

made for the exercise of the administrative judgment of the Commission." That the Court is here speaking of the Commission's exercise of judgment with respect to the allowances for the past involved in the action in assumpsit, is made clear by its immediately succeeding statement that (*ibid.*):

> The Circuit Court of Appeals, without supporting evidence in the record as to any specific items, said that there are obviously other expenses which the shipper must bear over and above the actual rental paid. If this were so, the reflection of those expenses, as well as the rental itself, in the allowance paid by the carrier to the shipper for the use of the latter's cars, would be a matter for the administrative judgment of the Commission and not for determination by a court.

Since there was no question that, so far as future allowances are concerned, the determination of the amount thereof could not be for a court, we believe the Court must have been speaking, not of the prescribing of allowances for the future for publication in the railroads' tariffs, but of the allowances for the past involved in the assumpsit action and over which the one-judge court had in fact assumed jurisdiction. Because the assumpsit action involved only claims relating to the past (see 104 F. 2d 903, 905–906), this Court would not have stayed the one-judge court's hand until the Commission could act unless this Court had de-

cided that Section 15 (13) gave the Commission power over past allowances.

After mentioning (308 U. S. at p. 431), the rules in the railroads' tariffs, which, because of the circumstances described, precluded payment of the published 1.5-cent mileage allowance on tank cars to the Oil Works, the Court makes other statements that make evident that the administrative question of which it is speaking was the amount of the allowance to which the Oil Works was lawfully entitled for past transactions. The Court states in substance (p. 431) that it agreed with the circuit court of appeals that the shipper, the Oil Works, furnished the cars in the present instance and that the Car Company did not, and that the shipper was, therefore, entitled, under the plain terms of Section 15 (13), to be paid by the carrier a just and reasonable allowance. Then the Court departs from the views of the circuit court of appeals, by stating that it was plain that no rule of the carrier may provide for the payment of such allowance to any other person; and that it believed that the consideration in this case that the Car Company acted merely as the collecting agent for the shipper did not remove the case from the Commission's jurisdiction. The circuit court of appeals had held that the shipper-lessee (the Oil Works) was entitled to the full amount of the car mileage allowances collected by the Car Company for the period involved and thus had treated the allowance of 1.5

cents per mile named in the tariffs as properly applicable and payable to the Oil Works." This Court, having just held that this was not the case, in effect further says that the fact that the Car Company had acted, not for itself but merely as collecting agent for the Oil Works did not alter the situation and make the published 1.5 cents mileage allowance the applicable amount, but that it was essentially a situation for the Commission's jurisdiction and determination of the proper amount of allowance payable to the Oil Works for providing the facility. The opinion then states (pp. 431–432) that, "if it should appear that, with respect to the tank cars in question, the shipper-lessee is making substantial profits on leased cars, by reason of the excess of the mileage allowances over the rentals paid, it might in the light of all the facts be found that the shipper is, in the result, obtaining transportation at a lower cost than others who use cars assigned them by the carriers or own their own cars"; that "the Commission has found that, in the case of refrigerator cars, held under similar leases, this has been the case"; and that, "as the tariffs now contain no provision for the payment of car mileage allowances by the railroad to the shipper directly, and as, upon the face of things as disclosed by this record, the shipper is apparently reaping a substantial profit from the use of the cars, a clear case is made for exercise of the administrative judgment of the Commission."

It will be seen that the last statement above again shows that the circumstance making a clear case "for exercise of the administrative judgment of the Commission" is the absence of any tariff provision for the payment of car-mileage allowances to the Oil Works directly. In this connection, it is important to note that, if the exercise of administrative judgment and functions referred to had been the determining and prescribing of allowances for the future, the Commission's authority under Section 15 (13) would have attached regardless of whether there was an existing applicable tariff provision in respect thereof.

The portions of the opinion in the *El Dorado Terminal Co.* case, above discussed, are the ones dealing particularly with the administrative questions arising in the assumpsit action which are pointed to by the Court as administrative questions for the Commission. The appellants, however, in support of their contention that what was referred to was the prescribing of allowances for the future, rely on an earlier discussion in the opinion as to the Commission's general authority in the matter of allowances, which contains the statement that "the Commission is compelled to ascertain * * * a fair and reasonable compensation * * * and prescribe a uniform rate" of allowance (see Br. 13–14). This statement is contained in the following paragraph of the opinion (308 U. S. at pp. 429–430):

As the Circuit Court of Appeals has

> pointed out, different shippers may have differing costs in respect of privately owned cars furnished the carriers. Nevertheless, as the allowances to be made them by the carriers for the use of such cars must be the subject of published schedules, and must be just and reasonable, the Commission is compelled to ascertain in the light of past and present experience a fair and reasonable compensation to cover such costs and prescribe a uniform rate which will reflect such experience. It is inevitable that some shippers may be able to furnish facilities at less than the published allowance while others may find their costs in excess of it. This fact, however, does not militate against the fixing of a uniform rate applicable to shippers properly classified by the Commission.

The appellants, in relying on the above statement with respect to the prescription of future allowances, overlook the fact that the Court is there considering and answering the decision of the circuit court of appeals that the 1.5 cents allowance on tank cars published in the carriers' tariffs applied to the Oil Works. That court had held in effect that, since shippers in furnishing tank cars to the railroads were bound to have differing costs, and that, since the statute in requiring that allowances therefor be published unquestionably recognized this and still contemplated the publishing of uniform allowances (that is, allowances based on average costs), there was nothing

which legally precluded the publishing of the same allowance for all shippers furnishing such cars; and this, the court said, the Commission had itself sanctioned in *In re Private Cars*, 50 I. C. C. 652, by there prescribing a single allowance of 1 cent per mile on tank cars of all kinds and by later raising the rate to 1.5 cents. The circuit court of appeals further said that it "is inevitable if the Congressional intent of uniformity of charge by fixed rates, applicable to all suppliers, is to be attained" that a uniform maximum allowance fixed by the Commission and published in the tariffs will, "in many cases yield a profit to certain shippers." 104 F. 2d at pp. 909, 911.

Applying these views of the circuit court of appeals to the paragraph of this Court's opinion in question (*supra*, pp. 34–35), it will be seen that, in the first sentence of the paragraph, the Court agrees with the circuit court of appeals that different shippers may have differing costs in furnishing cars to the carriers; and it also agrees that, despite this, since the allowance to compensate them must be published and must be just and reasonable, the Commission is compelled to ascertain a just and reasonable compensation to cover such costs and prescribe a uniform rate of allowance reflecting the same. The Court then states that the fact that it is inevitable that the

[11] The court's description of the action taken by the Commission in *In re Private Cars*, 50 I. C. C. 652, is not altogether correct. See 258 I. C. C. at p. 379.

costs of some shippers will be less than the published allowance while the costs of others will exceed it does not militate against the fixing of a uniform rate applicable to shippers properly classified by the Commission.

By this latter statement, we do not understand that this Court has reference simply to the fact that, in the matter of allowances to shippers furnishing cars to the carriers, it is proper and necessary to classify "shipper-owners" and "shipper-lessees" separately, but rather it seems plain that the Court is in general disagreement with the view that there is any such "intent of uniformity of charge by fixed rates, applicable to all [shipper] suppliers" of cars as would require or justify the limiting of the number of published allowances to an extent that the allowances "would in many cases yield a [substantial] profit to certain shippers" (104 F. 2d at pp. 909, 911). "Shipper-owners" of tank cars are separated into classes in accordance with the type of tank cars they require, and there are, doubtless, other ways in which they can be further classified, if necessary to prevent certain of them from reaping a substantial profit from their practice of furnishing cars to the railroads. With respect to "shipper-lessees", it is apparent that it is much more difficult to do this effectively, but, in any event, it seems evident that the paragraph of the opinion in question is principally directed to pointing out that there is no such statutory intent of uniform-

ity of allowance,[12] "applicable to all suppliers" of cars as would require an allowance under which certain shippers would reap a substantial profit out of the published rates. In support of its holding that the published 1.5-cent mileage allowance on tank cars was applicable to, and legally due, the Oil Works, the circuit court of appeals stated that the statutory intent led to that result; this Court's answer was simply to the effect that there was no need for such a conception of the statute in view of the Commission's broad authority in classifying allowances (308 U. S. at p. 430).

Subsequently, this Court, after referring to the fact that the question as to the reasonable allowance due the Oil Works was committed to the Commission's administrative judgment, in effect pointed to the action taken by the Commission in the *Refrigerator Car Case*, 201 I. C. C. 323, as the guide it might properly follow in the case of the shipper here—the Oil Works (308 U. S. at pp. 431–432). In that case, the Commission made no order as to the future but simply condemned

[12] The Elkins Act's purpose of uniformity in rates charged shippers is a different thing from uniformity of allowances paid to shippers out of the rates for supplying facilities of transportation. In fact, individual allowances exactly measuring the costs of particular shippers in furnishing cars would not disturb uniformity of application of the rates, whereas allowances based on average costs do have that effect in varying degree. This Court's opinion indicates that the limitation upon spreading an allowance over average costs is at a point short of the point where it will yield substantial profits to particular shippers.

as unlawful the payment of allowances to shipper lessees in excess of their actual costs as reflected by their rental payments. Here the Commission approved "the principles applied in the *Refrigerator Car Case* as related to the situation * * * involved" (258 I. C. C. at p. 380).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decree of the district court should be affirmed.

J. HOWARD MCGRATH,
Solicitor General.
WALTER J. CUMMINGS, JR.,
Attorney.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

JANUARY 1946.

APPENDIX

Section 41 of Title 28, U. S. C. provides:

> The district courts shall have original jurisdiction as follows:
>
> * * * * *
>
> Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

Section 47 of Title 28, U. S. C. provides in part:

> * * * upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to [three] judges and the same procedure as to expedition and appeal shall apply.

Section 6 (7) of Part I of the Interstate Commerce Act provides:

> No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff

filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. (49 U. S. C. 6 (7).)

Section 15 (13) of Part I of the Interstate Commerce Act provides:

If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section. (49 U. S. C. 15 (13).)

Section 1 of the Elkins Act provides in part:

That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed

by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs of rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not

less than one thousand dollars nor more than twenty thousand dollars: * * *.

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act. (49 U. S. C. 41.)

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II. The Commission's determination "that an allowance to the Oil Works by the respondents, rail carrier or carriers, or by the Tank Car Corporation, under the agreement, in excess of said rental, would be unjust and unreasonable, and would unduly prefer the Oil Works as a shipper of its commodities transported by it in the tank cars herein involved" is fully supported by evidence 34

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 428

EL DORADO OIL WORKS and EL DORADO TERMINAL COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL AMERICAN TRANSPORTATION CORPORATION, et al.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

Brief for General American Transportation Corporation, Appellee, on Reargument

INTRODUCTORY

This brief is presented in behalf of appellee, General American Transportation Corporation (intervening defendant in the United States District Court), successor in interest to General American Tank Car Corporation, defendant in the suit in the United States District Court out of which the instant cause has arisen. For convenience, each of these two corporations will be hereinafter referred to without distinction as the "Car Corporation". Similarly, the appellants herein, El Dorado Oil Works

and El Dorado Terminal Company, will be referred to without distinction as the "Oil Works".

The United States District Court, specially constituted of three judges under the Urgent Deficiencies Act (38 Stat. 219; 28 U.S.C., Secs. 41(28) and 43-48, inclusive) concluded that that court was without jurisdiction of this suit and for that reason the suit should be dismissed (R. 33-40). The Court said: "We do not pass upon the merits of the cause * * *" (R. 35). By the final decree the relief prayed for was denied and the complaint was dismissed "for want of jurisdiction" (R. 40-47).

Subsequently to the prior argument in this cause, this Court entered an order dated February 11, 1946, as follows:

> "Restored to the summary docket for further argument on the merits on the assumption that the District Court has jurisdiction."

This brief will therefore be addressed to the merits only. In some measure it will comprehend the presentation in the prior brief for this appellee, dated January 23, 1946, it being understood that the briefs currently to be filed will supersede those heretofore submitted.

OPINIONS BELOW

The opinion of the specially constituted District Court (R. 33) is reported in 59 F. Supp. 738.

The report of the Interstate Commerce Commission is reported in 258 I.C.C. 371.

JURISDICTION

The decree of the District Court was entered April 9, 1945 (R. 40). The petition for appeal filed June 1, 1945, was allowed the same day (R. 41). Probable jurisdiction was noted October 15, 1945. The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (U.S.C., Title 28, Sec. 47), and Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U.S.C., Title 28, Sec. 345).

QUESTIONS PRESENTED

Whether the Interstate Commerce Commission heard and determined the question, held by this Court to be administrative in character, and entrusted to the Commission for determination.

As subordinate questions,

(a) whether a full and adequate hearing was afforded;

(b) whether the Commission's findings and conclusions are supported by evidence;

(c) whether the Commission usurped the province of the District Court.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in the Appendix.

STATEMENT OF THE CASE

This cause had its origin in a suit at law brought by the Oil Works, lessee of certain railroad tank cars from the Car Corporation, the owner and lessor of such cars, to recover from the Car Corporation certain moneys, hereinafter styled "car mileage", received by the Car Corporation from the rail carriers as compensation for the use of the cars in the transportation of property of the Oil Works in interstate commerce. The moneys sought to be recovered by the Oil Works constitute the excess of the car mileage, so received by the Car Corporation from the rail carriers, above the amount of the car rental payable by the Oil Works for the leased cars. Under the terms of a so-called lease agreement (September 28, 1933) (R. 52) the Car Corporation agreed, for a term of three years commencing on January 1, 1934, to furnish tank cars to the Oil Works for the shipment of the latter's products at a specified monthly rental for each car. It was provided that fifty cars, styled "Permanent Cars", should be so furnished at a rental of $27.50 per car per month, and that such additional cars as the Oil Works might require would be furnished at a rental of $30 per car per month. It was further provided that the Car Corporation would collect from the rail carriers over whose lines of railway such cars would pass the car mileage payments made by the rail carriers as compensation for the use of such cars in railroad service and would credit the payments so collected to the car rental or service account of the Oil Works. The car mileage payments so made by the rail carriers substantially exceeded the Oil Works' car rental. During the three-year period

covered by the agreement the car mileage earnings exceeded the car rental by $33.04 per car per month on the average (R. 203, 234A, 235).

For approximately six months the Car Corporation credited the Oil Works with the full amount of the car mileage and paid over to the Oil Works the excess of the car mileage over the car rental. On July 2, 1934, the Interstate Commerce Commission issued its report in a case entitled "*Use of Privately Owned Refrigerator Cars*" 201 I.C.C. 323, 382 (1934), in which it was held that the payment to shippers of car mileage earnings, "either direct or through car owners", in excess of the amount of the rental paid for the use of the cars and other actual expenses in connection therewith, is in violation of the Elkins Act. The findings of the Commission were confined to practices in connection with the use of privately owned refrigerator cars, since the investigation itself was thus limited. But the Commission pointedly observed:

> "The discussion herein has been confined almost entirely to refrigerator cars and the findings will be so restricted, but the general principles enunciated apply equally to all other types of private cars" (R. 248).

Pursuant to this decision condemning practices of this character as violative of the Elkins Act, the Car Corporation, which theretofore had faithfully made the agreed payments, refused further to credit or pay over to the Oil Works the car mileage earnings in excess of the car rental. This change in practice on the part of the Car Corporation was based on its conclusion, upon advice of counsel following the decision of the Commission referred to above, that such payments would be in violation of the

Elkins Act (R. 193). Accordingly, commencing after the month of June, 1934, the Car Corporation credited the car mileage to the Oil Works in amounts equal to the car rental or service charges but made no payment of the excess.

By its suit at law the Oil Works sought to recover the balance of the car mileage payments which had been received by the Car Corporation during the period extending from January 1, 1934 to May 31, 1935. This balance, i.e., the unpaid excess above the car rental, amounted to $18,532.78 (R. 239). In defense the Car Corporation pleaded that it was prohibited by the Elkins Act from paying over such excess car mileage revenue to the Oil Works in that, by such payment, the Oil Works would secure the transportation of property at rates less than the tariff rates, thereby obtaining a rebate or concession and an advantage or a discrimination. The text of this plea in defense has been set forth in the answer of the Car Corporation to the complaint in the District Court in the instant case (R. 24).

The United States District Court for the Northern District of California sustained the Car Corporation's plea in defense and gave judgment accordingly for the Car Corporation. Upon appeal, the United States Circuit Court of Appeals for the Ninth Circuit reversed the judgment of the District Court (*El Dorado Terminal Company v. General American Tank Car Corporation*, 104 Fed. (2d) 903). Upon the petition of the Car Corporation this Court granted a writ of certiorari. On January 2, 1940, this Court reversed the judgment of the Circuit Court of Appeals and remanded the cause to the District Court, direct-

ing that the cause be held pending the conclusion of an appropriate administrative proceeding before the Interstate Commerce Commission. *(General American Tank Car Corporation v. El Dorado Terminal Company,* 308 U.S. 422 (1940).)

We are not in agreement with the statement appearing upon pages 6 and 7 of the appellants' brief that, in the opinion delivered on January 2, 1940, "this Court generally followed and approved the reasoning of the Circuit Court of Appeals * * *." Our understanding is to the contrary. In this connection we would direct attention particularly to the second paragraph on page 26 of appellants' brief which purports in part to summarize the holding of this Court in "its former decision." The fact is that this is a partial summary of the conclusions of the Circuit Court of Appeals set forth upon page 427 of the prior opinion of this Court, and certainly there is no implication that those conclusions received the approval of this Court. On the contrary, in important respects the conclusions of the Circuit Court were disapproved. The text of the paragraph to which we have directed this criticism is plainly erroneous and misleading.

On June 7, 1940, the Oil Works filed a petition with the Commission (R. 43-57) praying "that the Commission cause an investigation to be made of the practices disclosed by the said action, and in the said opinion of the United States Supreme Court", and that after such investigation "the Commission enter its order holding that payment by the General American Tank Car Corporation to petitioners of the amounts so collected by said tank car corporation as mileage allowances for the use of the tank

ars leased by petitioners and furnished by them to the ailroad carriers may be made as provided in and for the ntire period covered by the agreement of the parties lated September 28, 1933, without the violation of any rovisions of the Elkins Act, and that the payments so nade are reasonable and will not accomplish a rebate, oncession or an advantage or discrimination in favor of ither of the petitioners or in violation of the provisions f the Elkins Act * * *" (R. 51). The petition did not nclude a request for an investigation looking to the deter- ination and prescription of car mileage rates for general pplication. The complete text of the prayer of the petition s reproduced in the footnote.[1]

Pursuant to the petition of the Oil Works the Interstate ommerce Commission on July 24, 1940, made its order nstituting an investigation (R. 57, 58). All common car- iers by railroad participating in Trans-Continental

1. "Wherefore, petitioners pray that the Commission cause an nvestigation to be made of the practices disclosed by the said ction, and in the said opinion of the United States Supreme Court, nd after such investigation and such hearing as the Commission ay desire, the Commission enter its order holding that payment by he General American Tank Car Corporation to petitioners of he amounts so collected by said tank car corporation as mileage llowances for the use of the tank cars leased by petitioners and urnished by them to the railroad carriers may be made as provided n and for the entire period covered by the agreement of the parties ated September 28, 1933, without the violation of any provisions f the Elkins Act, and that the payments so made are reasonable nd will not accomplish a rebate, concession or an advantage or dis- rimination in favor of either of the petitioners or in violation of the rovisions of the Elkins Act, and that such other and further order r orders be made as the Commission may consider proper in the remises." (R. 51)

Freight Bureau Tariff No. 3-N, I.C.C. No. 1452, were made respondents. The matter was heard before an Examiner of the Commission on December 9 and 10, 1940. Evidence was presented on the part of the Oil Works and, in turn, on the part of the respondent rail carriers, and likewise on the part of the Car Corporation, which intervened in the proceeding (R. 61-236). The Oil Works offered no evidence looking to the determination of mileage rates; neither did it request that such evidence be produced by any party to the proceeding. No evidence tendered by the Oil Works was excluded. The Commission's report was issued under date of April 10, 1944 (R. 237-260). A petition on the part of the Oil Works for rehearing was denied (R. 261).

The Oil Works brought the instant suit, in the specially constituted District Court of three judges, praying for a decree declaring that the Commission's order is null and void and that it be set aside. From the final decree of that court, dismissing the action for want of jurisdiction, the Oil Works has prosecuted this appeal.

SUMMARY OF ARGUMENT

1. The Interstate Commerce Commission heard and determined the question which this court held to be administrative in character, and entrusted to the Commission for determination by its opinion in *General American Tank Car Corporation v. El Dorado Terminal Company, et al.*, 308 U.S. 422 (1940).

(a) The issue which was presented in the assumpsit action in the United States District Court was raised

by the Car Corporation's plea in defense that the payment of car mileage earnings to the Oil Works in an amount exceeding its car rental would violate the Elkins Act.

(b) This Court defined the administrative question held to be within the competence of the Commission, as "the question of the reasonableness and legality of the practices of the parties" under the terms and operation of the lease contract.

(c) By its petition to the Commission the Oil Works prayed that an investigation be made of "the practices disclosed by the said action" and that the Commission enter an order holding that the car mileage in full might be paid by the Car Corporation to the Oil Works without violation of law.

(d) The Commission's order of investigation, entered in response to the petition of the Oil Works, called for an investigation to determine whether the practices involved under the terms and operation of the lease contract were unlawful in violation of the Interstate Commerce Act (R. 57, 58).

(e) After full hearing the Commission found and concluded that a just and reasonable allowance as a maximum to have been paid to the Oil Works for the cars in which its shipments moved would have been an amount not exceeding the rental payable by it under the terms of the lease contract and that an allowance in excess of such rental would be unjust and unreasonable and would unduly prefer the Oil Works as a shipper of its commodities.

2. The Commission's determination "that an allowance to the Oil Works by the respondents, rail carrier or carriers, or by the Tank Car Corporation, under the agreement, in excess of said rental would be unjust and un-

reasonable, and would unduly prefer the Oil Works as a shipper of its commodities transported by it in the tank cars herein involved" is fully supported by evidence.

3. The Commission correctly concluded that payment to the Oil Works of any part of the mileage earnings received by the Car Corporation from the rail carriers in excess of the amount of the car hire or rental payable by the Oil Works for the use of the tank cars would violate the prohibitions of the Elkins Act.

(a) The prohibitions of the Elkins Act are not restricted to carriers and shippers but broadly forbid concessions in respect to transportation on the part of "any person, persons, or corporation."

(b) A shipper who reaps substantial profits through the use of privately owned cars obtains thereby a rebate, concession and preference.

(c) Performance under contracts must conform with statutory requirements.

4. The Commission has not assumed to decide the civil action in assumpsit pending in the District Court; neither has the Commission "usurped the function of the District Court."

5. An administrative order of the Commission is subject to judicial review to the extent only of determining whether the order is within the scope of the Commission's authority and the basic prerequisites of proof have been satisfied.

ARGUMENT

FOREWORD—THE COMMISSION'S CONTINUING CONCERN WITH PROBLEMS ARISING FROM THE USE OF PRIVATELY OWNED CARS.

This Court has had occasion to say:

> "Violation of the commerce acts through receipt of advantages is to be tested by actual results, not by intention. Any and all means to accomplish the prohibited end are banned." (*Union Pacific Railroad Co. et al. v. United States, et al.*, 313 U.S. 450, 462) (1941)

The privately owned car has been an instrument especially favored by shipper interests who are desirous of circumventing the terms and purpose of the Elkins Act and related statutes. The law permits the use of privately owned cars but expressly subjects them to all of the requirements and restraints which govern carrier-owned cars. It is clearly the design of the statute, expressed in Section 1(3) of the Interstate Commerce Act, that all cars, "*irrespective of ownership or of any contract, express or implied, for the use thereof*", shall be so employed as to avoid conflict with the essential provisions and purposes of the governing statutes. In brief, the use of the privately owned car is permitted, but only upon the condition that it shall not serve as a means by which rebates or concessions may be obtained, or by which discrimination or preference may be practiced.

Throughout the greater part of its existence the Commission has been gravely concerned by reason of the persistence of rebating and discrimination in connection with the use of privately owned cars. This concern is disclosed particularly in the Commission's annual reports to Congress. Excerpts from certain of these reports will be found significant.

In its Annual Report for 1893 the Commission dealt at length with "*Payment of Car Mileage for Use of Private Cars*" (pp. 60 et seq.) and referred to the "many discriminations" resulting from the practice (p. 66).

In its Annual Report for the year 1903 the Commission again emphasized the "*Evils resulting from the Use of Private cars*" (p. 22 et seq.). Speaking particularly with respect to the use of stock cars, the Commission said, *inter alia*:

> "it is charged to have been the practice of the concerns owning such cars to divide with the shippers the mileage received from the railroad companies, *a practice which operated to the same effect as the payment of rebates to such shippers*. * * *" (p. 24) (Emphasis supplied.)

In its Annual Report for the year 1906 (p. 48) the Commission commented with satisfaction upon the decision of the United States Circuit Court in *I. C. C. v. Reichmann*, 145 Fed. 235 (1906), holding that a private car company which furnishes its cars to the rail carriers for the use of shippers "is within the provisions of the Elkins Law." Further summarizing this decision the Commission said:

> "The giving by such a car company of any rebate to a shipper using its cars is a violation of such statute. Such a car company is therefore subject to the jurisdiction of this Commission when inquiring into the operations of any agency of transportation which may so conduct its business as to destroy uniformity of rates. (145 Fed. Rep. 235)"

In its Annual Report for 1940 the Commission said (p. 74):

> "Other instances of the granting of concessions to shippers were revealed by investigations of the meth-

ods employed by private car companies in connection with the leasing by them to shippers of equipment which those shippers furnished to railroads for transportation of their own shipments. The car companies paid to the shippers, out of the mileage allowances which the former received from the railroads, greater amounts than the rentals paid to them by the shippers for the use of the equipment, and thus put the shippers in a position where they received transportation of their goods at less than the lawful rate."

In its Annual Report for 1941 the Commission reviewed the results of its investigation of a particular "scheme by which shippers obtained concessions from private car companies." The instance is summarized in the following terms (pp. 82-83):

"One investigation brought to light a scheme by which shippers obtained concessions from private-car companies. Shipments were tendered to railroad companies in tank cars owned by those companies which had been rented to the shippers. The railroads paid to the owners of this equipment mileage allowances for the use thereof in the performance of transportation over their rails, and the private-car companies turned over portions of such allowances to the shippers. Such payments to the shippers, instead of being made directly, were given by the private-car companies to dummy companies which had been set up for this purpose. The amounts thus paid were substantially in excess of the rentals paid by the shippers to the private-car companies for the use of the equipment. Thus the effect of the arrangement was to place the shippers in a position where they received transportation at less than the lawful rate. Informations were filed against two private-car companies and one officer of a corporation ship-

per. Upon pleas of guilty by the three defendants fines totaling $35,000 were imposed and collected."

See also Annual Report for 1889, pp. 18, 108; Annual Report for 1893, pp. 60-67; Annual Report for 1903, pp. 22-26; Annual Report for 1905, pp. 10, 11; Annual Report for 1906, p. 48.

The efforts of the Commission to eliminate improper practices in the use of privately owned cars culminated in a general investigation, nationwide in scope, instituted on the Commission's own motion on July 6, 1931. Part V of this investigation (Ex Parte No. 104) was directed specifically to "Private Freight Cars". For the purpose of hearing and investigation the proceeding was consolidated, so far as it related to refrigerator cars, with an Investigation and Suspension proceeding (Docket No. 3887) entitled "*Use of Privately Owned Refrigerator Cars*", 201 I.C.C. 323. The extended hearings and investigations thereupon conducted by the Commission eventuated in the report and decision which, as stated heretofore, brought about the change in practice on the part of the Car Corporation in the matter of the payment of car mileage.

The Commission's report contains a formidable assembly of facts, arising out of a variety of situations, revealing practices in the use of privately owned cars which are destructive of the integrity of the published freight rates and which produce discrimination and preference among shippers in varying degree. It is shown in particular that the car mileage allowances received by the car owning companies from the rail carriers and paid over to the shipper in excess of the shipper's rentals afford a means by which un-

disclosed rebates may be extended and all manner of preference may be accomplished.

It was the holding of the Commission that the payment to shippers of mileage earnings, whether directly by the carriers or through car owners, "*in excess of the amount of rental said shippers pay for the use of the cars and other actual expenses in connection therewith*", is in violation of the Elkins Act. (pp. 382-383)

It is not practicable to review the Commission's evidentiary findings in detail, but we may briefly exemplify.

(1) "The advantages claimed in using private cars are * * *" (*inter alia*) "profits derived from mileage paid by the carriers" (p. 336). (2) A particular shipper "pays $45 and $50 per car per month for its leased cars and receives mileage earnings of approximately $32.50 per car per month in excess thereof, a profit of $6,500 per month or $78,000 per year" (p. 339). (3) A shipper-lessee "refused to tell the amount it pays for the cars or to furnish a copy of its lease. The amount of profit it makes in mileage earnings cannot be determined." (p. 339). (4) A shipper leases cars "at a fixed amount per month which it refused to disclose. It admitted that the mileage earnings exceed the amounts paid the car owners" (p. 341). (5) A shipper "learning that other shippers were making money out of private cars, secured a contract under which it was to receive all mileage earnings in excess of an agreed amount. The witness refused to state the amount, but acknowledged that in 1931 payments to it by the car company averaged $18.35 per car per month, and in 1932 were $21.27 per car per month" (p. 342). (6) "The majority of the shipper protestants who rent or lease cars and of the private-car lines heard herein refused to divulge the amounts paid to or retained by said

car lines. The shippers refused on the ground that they did not feel warranted in doing so without the consent of the car lines. The car lines refused on the ground that they could not afford to do so because of the keen competition between them" (p. 380). (7) A particular car line company leases and assigns cars to private shippers. "It is opposed to the practice, and claims it does so only in order to meet competition of other private and railroad controlled car lines." (p. 364).

Such findings serve concretely to disclose the violations of the Elkins Act which must inevitably result if shipper-lessees and car-owning companies may freely bargain as to the disposition of the car mileage payments received by the car owning companies from the rail carriers for the use of privately owned cars.

We have offered this historical review of the Commission's efforts to eliminate evils in the use of privately owned cars for two purposes: *first*, to show that the abuses have been serious, and difficult to reach because of their covert character, and, *second*, to show that the conclusions reached by the Commission in the instant case are in precise harmony with its prior expressions and determinations. The Commission has been unrelenting in its hostility to the use of the privately owned car as an instrument of rebates, concessions, discrimination and preference.

I.

THE INTERSTATE COMMERCE COMMISSION HEARD AND DETERMINED THE QUESTION WHICH THIS COURT HELD TO BE ADMINISTRATIVE IN CHARACTER, AND ENTRUSTED TO THE COMMISSION FOR DETERMINATION BY ITS OPINION IN GENERAL AMERICAN TANK CAR CORPORATION V. EL DORADO TERMINAL COMPANY, ET AL., 308 U.S. 422 (1940)

It is important at the threshold to determine the nature of the issue here presented (1) as it arose in the civil action in assumpsit in the District Court, (2) as it has been formulated and characterized by this Court, (3) as it was raised in the petition of the Oil Works to the Commission, (4) as it was framed by the Commission's order of investigation, and (5) as it was determined in the Commission's report. The essential continuity of the issue throughout the successive chapters of this litigation will be apparent.

(a) The issue which was presented in the assumpsit action in the United States District Court was raised by the Car Corporation's plea in defense that the payment of car mileage earnings to the Oil Works in an amount exceeding its car rental would violate the Elkins Act.

There was but one issue of moment in the assumpsit action in the District Court. That issue was raised by the defense pleaded by the Car Corporation in its answer to the complaint. The plea in defense was briefly to the effect that the Car Corporation was prohibited by law, and particularly by the Elkins Act, from paying over to the Oil Works the excess of the car mileage revenue over the car hire or rental payable by the Oil Works, in that the latter thereby

> "would secure the transportation of property at rates less than the rates named in the published and filed

tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act." (R. 24-25)

It is conceded in appellants' brief (p. 30) that "the only issue" in the District Court was the issue arising from the defense so pleaded. The issue is properly to be characterized as the legality of the practice of payment by the Car Corporation to the Oil Works of car mileage earnings in excess of the latter's car hire or rental. On appeal the issue continued unchanged.

(b) This Court defined the administrative question, held to be within the competence of the Commission, as "the question of the reasonableness and legality of the practices of the parties" under the terms and operation of the lease contract.

In the early part of its opinion in *General American Tank Car Corporation v. El Dorado Terminal Company, et al.*, 308 U.S. 422 (1940), this Court considered matters of general principle. That discussion, however, is wholly preliminary in character. When the Court addressed itself directly to the issue which had arisen in the litigation by reason of the affirmative defense pleaded by the Car Corporation, it expressed itself as follows (p. 428):

> "We hold that the District Court had jurisdiction but that, upon disclosure of the terms and operation of the lease contract, it should not have proceeded to adjudicate the rights and liabilities of the parties in the absence of a decision by the Commission with respect to the validity of the practice involved in the light of the provisions of the Interstate Commerce Act."

The Court said further (pp. 431-432):

"* * * If it should appear that, with respect to the tank cars in question, the shipper-lessee is making substantial profits on leased cars, by reason of the excess of the mileage allowances over the rentals paid, it might in the light of all the facts be found that the shipper is, in the result, obtaining transportation at a lower cost than others who use cars assigned them by the carriers or own their own cars. The Commission has found that, in the case of refrigerator cars, held under similar leases, this has been the case.[12] The inquiry into the lawfulness of the practice is one peculiarly within the competence of the Commission.

"As the tariffs now contain no provision for the payment of car mileage allowances by the railroad to the shipper directly, and as, upon the face of things as disclosed by this record, the shipper is apparently reaping a substantial profit from the use of the cars, a clear case is made for the exercise of the administrative judgment of the Commission. The Circuit Court of Appeals, without supporting evidence in the record as to any specific items, said that there are obviously other expenses which the shipper must bear over and above the actual rental paid. If this were so, the reflection of those expenses, as well as the rental itself, in the allowance paid by the carrier to the shipper for the use of the latter's cars, would be a matter for the administrative judgment of the Commission and not for determination by a court."

"[12] Use of Privately Owner Refrigerator Cars, 201 I. C. C. 323."

The Court said again (p. 432) that

"the question of the reasonableness and legality of the practices of the parties was subjected by the Interstate

Commerce Act to the administrative authority of the Interstate Commerce Commission."

This is the language in which the Court has identified the administrative problem, has assimilated it to the problem which arose "in the case of refrigerator cars," and has plainly implied that a factual parallel would call for parallel conclusions. This is the specific issue which, as this Court said, called clearly "for the exercise of the administrative judgment of the Commission." It will be noted that the Court refers to "*the validity of the practice involved in the light of the provisions of the Interstate Commerce Act,*" namely, the practice under "*the terms and operation of the lease contract.*" The Court declares that "*The inquiry into the lawfulness of the practice is one peculiarly within the competence of the Commission.*"[2]

This Court did not say that the Commission should make an order prescribing allowances for the future. It approved the Commission's action in the *Private Refrigerator Car case*, supra, and there the Commission made no order but simply condemned the payment to shipper-lessees of allowances in excess of their actual costs as reflected by their rental payments.

This Court addressed itself to the particular issue which had arisen in the litigation by reason of the Car Corpora-

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2. It is stated in appellants' brief (p. 28) that this Court in the course of its opinion "determined that the car lease agreement was lawful." This may be misleading. The Court upheld the propriety of car leasing agreements in general but did not undertake to determine the validity of practices under the instant agreement (p. 429). That question was specifically reserved for determination by the Commission.

tion's plea in defense, viz., whether car mileage in excess of car-rental could be paid over by the Car Corporation to the Oil Works without violating the Elkins Act. This was held to be an administrative question reserved for the Commission's determination. There could have been no administrative question so reserved if this Court had intended to rule that the Oil Works is entitled to receive the excess car mileage. Nor would this Court have referred to the findings and conclusions of the Commission "in the case of refrigerator cars, held under similar leases" without implying that parallel facts would call for a parallel conclusion. The Court observed that, "upon the face of things as disclosed by this record, the shipper is apparently reaping a substantial profit from the use of the cars," and, for that reason, "a clear case is made for the exercise of the administrative judgment of the Commission." This language is wholly incompatible with the Oil Works' contention that it is of right entitled to reap this "substantial profit."

The question was left to the Commission for its administrative determination. The District Court was required to stay its hand pending the result of an appropriate proceeding before the Commission (p. 433).

(c) By its petition to the Commission the Oil Works prayed that an investigation be made of "the practices disclosed by the said action" and that the Commission enter an order holding that the car mileage in full might be paid by the Car Corporation to the Oil Works without violation of law.

The prayer of the petition filed by the Oil Works with the Commission asks that "the Commission cause an

investigation to be made of the practices disclosed by the said action" and further prays that "the Commission enter its order holding that payment by the General American Tank Car Corporation to petitioners of the amounts so collected by said tank car corporation as mileage allowances for the use of the tank cars leased by petitioners and furnished by them to the railroad carriers may be made as provided in and for the entire period covered by the agreement of the parties dated September 28, 1933, without the violation of any provisions of the Elkins Act, and that the payments so made are reasonable and will not accomplish a rebate, concession or an advantage or discrimination * * * in violation of the provisions of the Elkins Act." (R. 43, 51).

Nowhere in the petition is there a request that the Commission make an investigation looking to the prescription of a car mileage rate for general application, or a prayer for an order that car mileage at that rate be paid over to the Oil Works. On the contrary, the petition is confined specifically to "*practices disclosed by the said action;*" and its objective is an order requiring that the mileage allowances in full may be paid over to the Oil Works, notwithstanding that they substantially exceeded the car rental payable by the Oil Works for the use of the cars. In brief, the petition of the Oil Works raises nothing more than the administrative question formulated in the opinion of this Court.

(d) The Commission's order of investigation, entered in response to the petition of the Oil Works, called for an investigation to determine whether the practices involved under the terms and operation of the lease contract were unlawful in violation of the Interstate Commerce Act (R. 57, 58).

The Commission's order of investigation dated July 24, 1940 (R. 58) is fully responsive to the petition of the Oil Works. An investigation was instituted

> "(1) to determine whether the practices involved under the terms and operation of the lease contract are unlawful in violation of the Interstate Commerce Act; (2) to determine whether a reasonable charge or allowance may be paid, and, if so, the amount thereof as a maximum to be paid by the carrier or carriers by railroad for the use of the tank cars furnished such carriers by petitioners for the transportation of the products of petitioners in interstate commerce from Berkeley and Oakland, Calif., in the period January 1, 1934, to December 31, 1936; and (3) to determine what findings shall be made, or what rules, regulations or practices shall be prescribed, or what orders shall be entered, to remove any unlawfulness that may be found to exist."

It will suffice to note that the order of investigation is not only responsive to the petition of the Oil Works but that it conforms with the opinion of this Court defining and characterizing the administrative question. That question was directed to the validity of the "*practices*" under the terms and operation of the lease contract.

The Oil Works did not question the propriety or sufficiency of the Commission's order of investigation. Indeed, it could not well question the scope of the order since it was fully commensurate with the petition seeking the investigation.

(e) After full hearing the Commission found and concluded that a just and reasonable allowance as a maximum to have been paid to the Oil Works for the cars in which its shipments moved would have been an amount not exceeding the rental payable by it under the terms of the lease contract and that an allowance in excess of such rental would be unjust and unreasonable and would unduly prefer the Oil Works as a shipper of its commodities.

In due course the Commission held its hearing, in which the Oil Works was permitted to introduce all of its proffered evidence. There was no curtailment or restriction in any respect. Evidence was presented on the part of the respondent rail carriers and likewise on the part of the intervening Car Corporation. No evidence was offered looking to the establishment of a car mileage allowance for general application. There was no suggestion that evidence of that character should be adduced. The Oil Works registered no objection to the adequacy or fairness of the hearing.

All of the foregoing is plain upon the record (R. 43-236).

In due course the Commission's report was issued, in which it found and concluded as follows (R. 249-250):

> "(1) That the rental paid or to be paid by El Dorado Oil Works to General American Tank Car Corporation under the terms of the lease agreement between those parties, dated September 28, 1933, was the only cost incurred by the former in furnishing the tank cars in which its shipments moved. A just and reasonable allowance as a maximum to have been paid by the respondents, rail carrier or carriers, to the Oil Works for the furnishing of such cars would have been an amount not to exceed such rental. Such an amount and allowance

has been paid to the Oil Works through credits made to the account of the Oil Works by the Tank Car Corporation.

(2) That an allowance to the Oil Works by the respondents, rail carrier or carriers, or by the Tank Car Corporation, under the agreement, in excess of said rental would be unjust and unreasonable, and would unduly prefer the Oil Works as a shipper of its commodities transported by it in the tank cars herein involved. The amount paid by the Tank Car Corporation to the Oil Works prior to July 1, 1934, under the terms of the agreement, to the extent it was in excess of the rentals due thereunder, was unjust and unreasonable, and unduly preferred the Oil Works as a shipper of its commodities.

(3) That the Oil Works is entitled to no allowance from the respondents, rail carrier or carriers, directly or through the Tank Car Corporation, for the special cleaning and preparation of the tank cars during the period of the agreement, January 1, 1934, to December 31, 1936."

The proceeding was thereupon discontinued (R. 260-261).

The findings and conclusions of the Commission have full record support.

It is plain from this narrative that the Commission addressed itself to the administrative question formulated in the opinion of this Court and to that question as raised in the Oil Works' petition for investigation, and that a proper and adequate hearing was held.

Most belatedly, the Oil Works argues that the Commission had no authority "to determine the validity of past transactions" but was authorized only "to deter-

time a just and reasonable allowance to be applicable for the future". (Appellants' brief, pp. 12, 13, 24, 25 and 29) Thus it is said on page 25 of appellants' brief:

> "Our construction of the provisions of Section 15(13) of the Act precludes a conclusion that the Commission had any authority under that section to determine the validity of past transactions but was authorized only, after investigation, to determine a just and reasonable allowance to be applicable for the future and to be published anew in the appropriate tariffs."

The contention now advanced that the Commission was without authority "to determine the validity of past transactions" is squarely in conflict with the petition of the Oil Works to the Commission. In that petition the Oil Works specifically invoked the authority of the Commission to determine the validity of past transactions. (R. 51) For the future nothing was sought. Having failed to persuade the Commission to rule favorably upon the issue raised in its petition, the Oil Works now assails the authority which it expressly requested the Commission to exercise.

Appellants' argument at this point is in substance and effect a challenge of the Court's conclusion that it is for the Commission to determine, as an administrative question, what payment, if any, should be made to the Oil Works for the use of the tank cars during the period covered by the suit in assumpsit. This contention is directly hostile to the prior conclusion of this Court that

> "the question of the reasonableness and legality of the practices of the parties was subjected by the

> Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission." (p. 432)

Pursuant to that conclusion the District Court was required to stay its hand "pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act." (p. 433)

The confusion in the appellants' reasoning at this point is further revealed by the following sentence reproduced from page 29 of the appellants' brief:

> "The only course open to the Commission and what must, therefore, have been intended by this Court, was a full determination, upon investigation in the light of all the facts, of a just and reasonable allowance to be paid in the future and to be set forth in the published tariffs."

It seems to be conceded, in the same paragraph from which the quoted sentence has been taken, that such published tariffs of allowances "to be paid in the future" could not have retroactive application. Whether or not this inference is correct, it is clear in any event that appellants have misconstrued the prior holding of this Court. Returning to page 430 of the Court's opinion, it will be noted that the Court has addressed itself to two somewhat distinct problems. As to the first, the holding is that if the carrier fails to set forth an allowance in a published tariff "the shipper may complain to the Commission, to the end that a proper allowance be ascertained and made effective by a schedule duly published." After observing that in the present case this has not been done, the Court approaches the second and the immediate problem as follows:

"Nor has the shipper ever applied to the Commission for its decision as to what was a proper allowance for the cars furnished by it."

It is this latter expression of the Court which is pertinent here. It is prefatory of all that follows, and the entire discussion thenceforth is directed to past transactions. The Court states (p. 432):

"As the tariffs now contain no provision for the payment of car mileage allowance by the railroad to the shipper directly, and as, upon the face of things as disclosed by the record, the shipper is apparently reaping a substantial profit from the use of the cars, a clear case is made for the exercise of the administrative judgment of the Commission."

We need not quote further. Enough has been set forth to make it clear that the administrative question which the Court entrusted to the Commission was the determination of such allowance as might be made for the *past*, that is, for the period covered by the action pending in the District Court. Nothing would have been gained by an inquiry looking to the prescription of car mileage rates for future application. The construction which the appellants now seek to impress upon the prior opinion of this Court would require virtually the complete erasure of all that has been said by the Court in the last three pages of its opinion. The Commission is plainly right in saying (R. 249):

"Were we to attempt to determine the reasonableness of allowances for a 'class' of tank cars such as these, we cannot tell how far reaching the investigation would have to be. Its result would be futile * * *."

Any determination that might be reached in such an investigation would, of necessity, be prospective in character. It would not serve to determine the specific question which arose in this litigation and which the Commission precisely determined.

This Court not only defined the administrative question and identified it with the question which had arisen in the course of the litigation in the District Court, but it relied upon its decision in

Mitchell Coal & Coke Co. v. Pennsylvania Railroad Company, 230 U.S. 247 (1913),

as a precedent for the disposition of the instant controversy. That case related entirely to past transactions. Answering the contention that the claim related to past transactions, the Court noted that:

> "* * * it is urged that a claim based upon the unreasonableness of past rates and discontinued practices raises a judicial question, of which the courts and not the Commission have jurisdiction." (p. 258)

But the Court said:

> "In considering the administrative questions as to reasonableness, the elements of the problem are the same, whether they involve the validity of obsolete allowances, discarded tariffs or current rates and practices. * * *
>
> As to past and present practices or allowances, the Commission has the same power and there is the same necessity to take preliminary action." (pp. 258, 259)

It is clear, accordingly, that in the cited case the Court was dealing with past practices and held that jurisdiction to determine their reasonableness and legality was vested

in the Interstate Commerce Commission. Upon the authority of that holding, it entrusted to the Commission the determination of "the reasonableness and legality of the practices of the parties" under the contract out of which the instant controversy has arisen.

Quite inexplicably, as it seems to us, the appellants rely upon the decision of this Court in *Great Northern Railway Co. v. Merchants Elevator Company*, 259 U.S. 285 (1922) and quote from the opinion of the Court as follows:

> "To determine what rate, rule or practice shall be deemed reasonable for the future, is a legislative or administrative function. To determine whether a shipper has in the past been wronged by exaction of an unreasonable or discriminatory rate is a judicial function." (Appellants' Brief, p. 23.)

But the appellants omit to quote the immediately succeeding sentence in that opinion of this Court reading as follows (p. 291):

> "*Preliminary resort to the Commission is required alike in the two classes of cases.*" (Emphasis supplied.)

There is nothing in the opinion of this Court in the cited case which affords support for the contentions of the appellants. The decision went no further than to hold that the construction to be given to a railroad tariff presents ordinarily a question of law and does not require preliminary resort to the Commission.

Appellants' contentions are not only incompatible with the ruling of this Court in its prior decision but they constitute a complete reversal of the position taken by the Oil Works in the proceeding before the Commission. We have seen

that by its petition to the Commission the Oil Works pra
that the Commission "cause an investigation to be
of the practices disclosed by the said action" and
the Commission enter its order that payment by the
Corporation to the Oil Works of the amounts colle
as mileage allowances "may be made as provided in
for the entire period covered by the agreement of
parties dated September 28, 1933, without the viola
of any provisions of the Elkins Act * * *." (R. 51) Cle
this prayer is directed to past practices and not at a
the determination of "a just and reasonable allow
to be paid in the future and to be set forth in the
lished tariffs".[3] It does not look to any future determ
tion of any character.

Moreover, in the opening statement of counsel for
Oil Works in the proceeding before the Interstate C
merce Commission it was made entirely clear that the
Works was asking "that this Commission shall in
form determine in line with the decision of the Supr
Court of the United States that the agreement betwee
Tank Car Corporation and the El Dorado Oil works
not an unlawful agreement, and that there was no

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3. The brief for the Oil Works overlooks the fact that S
15(13) of the Act was not so amended as to require the public
of mileage allowances in tariffs or schedules until Septembe
1940. For convenient reference the text of paragraph 15(13)
appeared prior to the amendment and also thereafter will be f
in the appendix to this brief. The first statutory requirement
car mileage alowances "be published in tariffs or schedules" be
effective on September 18, 1940, five years after the institut
suit by the Oil Works against the Car Corporation, and subsequ
also to the filing of the petition of the Oil Works with the
mission.

or moral obstacle in the way of its performance by both parties." (R. 73)

Not only so but counsel for the Oil Works objected to the receipt of evidence respecting the operations of the Car Corporation "in respect of all of its tank cars", insisting that the investigation should be limited to "the cars of the El Dorado Works". (R. 206, 209). The objections thus made are plainly inharmonious with the contentions now advanced that the Commission should have conducted an investigation looking to the determination of car mileage rates for future application.

It is far from the fact, as represented upon page 32 of the appellants' brief, that the Commission has in effect "commanded the carriers to violate the express provisions of the Act." The Commission has made no "order" with which the carriers are expected to comply. Neither are the appellants on tenable ground when they argue that the Commission in effect "sanctioned" the payment by the carriers to the Car Corporation of that part of the car mileage which exceeded the car rental (Appellants' Brief, pp. 13, 14). Neither directly nor by implication has the Commission expressed itself with respect to any payment to the Car Corporation. Its ruling does not go beyond the issue before it, viz., a determination of the amount of the allowance which might lawfully be paid to the Oil Works.

It is plain that the Commission's action is not only directly responsive to the petition for investigation filed with the Commission by the Oil Works, but that it is within the express terms of the ruling of this Court as to the character of the issue and the authority of the Commission over its determination.

II.

THE COMMISSION'S DETERMINATION "THAT AN ALLOWANCE TO THE OIL WORKS BY THE RESPONDENTS, RAIL CARRIER OR CARRIERS, OR BY THE TANK CAR CORPORATION, UNDER THE AGREEMENT, IN EXCESS OF SAID RENTAL WOULD BE UNJUST AND UNREASONABLE, AND WOULD UNDULY PREFER THE OIL WORKS AS A SHIPPER OF ITS COMMODITIES TRANSPORTED BY IT IN THE TANK CARS HEREIN INVOLVED" IS FULLY SUPPORTED BY EVIDENCE.

The uncontradicted evidence of record shows that the Oil Works' only cost in the use of the leased cars, for which it could lawfully be compensated, was its car rental. The evidence also showed, and again without dispute, that the car mileage earnings were greatly in excess of the car rental. Upon these facts it was clear that the Oil Works would reap "substantial profits" if it should receive the excess of the car mileage over the car rental.[4] Such "profits", in the view of the Commission, would be rebates and concessions, and would unduly prefer the Oil Works as a shipper of its commodities, in violation of the Elkins

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4. Appellants rely upon the decision in *Interstate Commerce Commission v. Diffenbaugh*, 222 U.S. 42 and upon the report of the Commission *In re Private Cars*, 50 I.C.C. 652, in support of their asserted right to realize a "profit" from the use of the cars (Appellants' Brief, p. 153). The decision in the first of these two cases goes no further than to hold that compensation by the rail carriers to one furnishing a transportation service (e.g., elevation of grain in transit) is not prohibited by the Elkins Act if the amount paid is neither unreasonable nor discriminatory and does not result in a rebate or other concession. The opinion shows that the published allowance "barely would pay the cost of the service rendered" (p. 47). In the second of these two cases it is said on page 687 of the report of the Commission: "It is conceded by car owners that they are not properly entitled to make a profit on their cars used by the carriers."

Act and other provisions of law. The Commission had previously condemned such payments to shippers, in excess of their car rental and other costs, by its decision in *Use of Privately Owned Refrigerator Cars*, 201 I.C.C. 323 (1934).

The appellants contend that the findings of the Commission are not supported by evidence. Plainly these contentions are without merit.

The Commission has found that the Oil Works showed "no item of cost in furnishing the tank cars to the carriers, for which the latter were liable under their obligations as common carriers, other than the rental." (R. 243) Reference is made to an expense incurred "for special cleaning and preparation of the cars used," but it appears that "the railroads, upon request, cleaned in the usual manner all the tank cars furnished." (R. 243) The Oil Works did not contend that the rail carriers were obligated to perform "the special cleaning services." The Commission found that such services were not "a common carrier obligation," and pointed out that the Oil Works would have had to stand the same expense "whether it owned the cars, or even if they were furnished by the carriers." (R. 243) Certainly these findings are beyond successful attack.

The Commission has found that the car mileage earnings exceeded the car rental payable by the Oil Works in substantial amounts. (R. 238, 239, 240) Thereupon, the Commission found further (R. 248-249):

> "The present record shows how under contracts such as the one between the Oil Works and the Tank Car Corporation the Oil Works, as shipper, would

reap a profit on the leased cars so substantial in amount, if paid over by the rail carriers out of the transportation charges through the Tank Car Corporation to the Oil Works, as to have the result of enabling the Oil Works thereby to obtain the transportation of the commodity it ships in interstate commerce at a lower cost than others who use cars assigned to them by the carriers, or who own their own cars."

These findings have full record support. Exhibit No. 9 received before the Commission (R. 203, 234A, 235) shows that during the three-year period covered by the contract the car mileage earnings exceeded the service charges on the average by $33.04 per car per month. Throughout the entire period extending from January 1, 1926, to September 30, 1940, the excess of the car mileage over the service charges amounted on the average to $26.34 per car per month. This exhibit may be considered in conjunction with Exhibit No. 10 (R. 211, 236) which presents the results of a study of all car service contracts in effect during the period extending from July 1, 1934 to September 30, 1940, in which it was provided that car mileage should be credited to the shippers in whole or in part. It appears that relatively few of the total number of cars in the service of shippers under contracts of this character have earned mileage in excess of the car rental or service charges. For example, in the year 1935 only 4% of the cars in service under such contracts earned excess mileage, and the cars which earned this excess mileage constituted

only 1.7% of the total number of cars then owned by the Car Corporation. In the light of this showing, it is clear beyond the possibility of dispute that comparatively few shippers of commodities in tank cars have profited through the car mileage allowance. It is clear, further, that the shipper-lessee whose cars have earned the greater amount of excess mileage would have a financial advantage over his competitors if the excess mileage should be paid over to him. In addition, a shipper-lessee to whom excess mileage is paid enjoys an advantage over the shipper who receives cars by assignment and is paid no mileage.

The undue preference found by the Commission consists in the fact that under the arrangement between the Car Corporation and the Oil Works the latter would receive the excess car mileage while other shippers, having less favorable arrangements, would receive no such payments. (R. 190, 192)

The Commission's findings not only have full record support but it is plain that the record does not admit of findings of different or contrary import.

Appellants refer to the "profit above the car rentals for the period during which the Car Company had paid over the mileage collected by it," and add that "The profit so realized was not a rebate, nor do the appellees make that claim." (Appellants' Brief, p. 15.) On the contrary, appellees do claim that the profit so realized by the Oil Works was a rebate, in that it served by that amount to reduce the Oil Works' transportation costs. The Commission found and concluded by its report herein that

"The amount paid by the Tank Car Corporation to the Oil Works prior to July 1, 1934, under the terms

> of the agreement, to the extent it was in excess of the rentals due thereunder, was unjust and unreasonable, and unduly preferred the Oil Works as a shipper of its commodities." (R. 250)

Appellants are in error in assuming that the Commission's findings have been rested in part upon the findings in the *Refrigerator Car Case*. (Appellants' Brief, p. 16) As the report plainly shows, the Commission's findings are based wholly upon the record in the instant case, and the Commission has done no more than note the comparability of the facts disclosed in the two proceedings. The appellants' reliance upon the decision in *Erie R. Co. et al. v. United States*, decided March 24, 1944 (Appellants' Brief, p. 16) is misplaced, since in that case it was admitted that the Commission's findings were not supported by any evidence of record before it.

The Oil Works contends upon brief that the carriers received their full freight charges under the applicable freight tariffs. (p. 17) This contention misses the point. The point is that the receipt by the Oil Works of the excess of the car mileage over the car rental and other actual expenses, if any, which the carriers are permitted to bear, would operate automatically to reduce the tariff rate. It is this excess car mileage which constitutes the "substantial profit" which the Commission condemned in *Use of Privately Owned Refrigerator Cars, supra,* as a rebate or concession and an unjust discrimination. As the Commission said on page 381 of its report in that case:

> "It cannot be denied that the net cost of the transportation to users of leased and rented cars is reduced by the amounts received in excess of the costs to them and that they are thereby removed from that absolute level of equality with other shippers which the statute

was enacted to establish and that the purpose of the legislation is defeated."

The Oil Works claims to be entitled to reap this profit out of the use of the privately owned cars, but it is for the Commission to determine whether the shipper may enjoy such profit without violation of law. We need not debate the merits of the issue. It is enough that the Commission has determined, upon evidence which admitted of no different determination, that the prohibitions of the law against rebates and concessions and preference and discrimination would be set at naught if shippers favored by particularly advantageous car-leasing agreements were permitted to enjoy the substantial profits represented by the excess of car mileage earnings over car rental and other expenses.

It is not material that the freight charges may have been paid by the consignees (Appellants' Brief, p. 17).[5] The Commission properly disposed of that contention in its report (R. 244-245).

Northern Central Ry. Co. v. United States, 241 Fed. 25 (C.C.A. 2nd, 1917);

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5. The comments in Appellants' Brief (p. 19) upon the decisions in *Northern Central Railway Co. v. United States*, 241 Fed. 25 and *Elgin J. & E. Ry. Co. v. United States*, 253 Fed. 907, reveal failure to grasp the point to which they were cited. In each of these cases it was held that payment of the freight charges by the consignee, rather than by the shipper, could not absolve the shipper from a charge of rebating. As was said in the latter of these two cases (p. 911): "the shipper obtains the transportation and is primarily liable for the freight charges, regardless of his contractual relations with his consignee governing the ultimate payment thereof."

Elgin, J. & E. Ry. Co. v. United States, 253 Fed. 907, 911 (C.C.A. 7th, 1918);

Ohio Tank Car Co. v. Keith Railway Equipment Company, 148 Fed. (2d) 4 (C.C.A. 7th, 1945) (Cert. Den. Oct. 8, 1945, 66 Sup. Ct. 38).

It is said in the brief for the Oil Works that the issue raised by the Car Corporation's plea in defense "involved a question of fact." (p. 30) If so, it would not aid the contentions of the Oil Works. But this Court has held that this is "a matter for the administrative judgment of the Commission and not for determination by a court."

The Commission's determination is within its administrative authority, and, being supported by substantial evidence, is conclusive.

III.

THE COMMISSION CORRECTLY CONCLUDED THAT PAYMENT TO THE OIL WORKS OF ANY PART OF THE MILEAGE EARNINGS RECEIVED BY THE CAR CORPORATION FROM THE RAIL CARRIERS IN EXCESS OF THE AMOUNT OF THE CAR HIRE OR RENTAL PAYABLE BY THE OIL WORKS FOR THE USE OF THE TANK CARS WOULD VIOLATE THE PROHIBITIONS OF THE ELKINS ACT.

According to our understanding, this review upon the merits extends only to a determination of (1) whether the Commission heard and determined the administrative question entrusted to it by the prior decision of this Court and (2) whether the Commission's findings are supported by the evidence. If the scope of judicial review should be enlarged so as to comprehend a determination of whether this Court, upon the same record, might have reached a conclusion differing from that reached by the Commission.

the Court would thereby be ruling upon a question which it has held to be administrative in character and committed by the statute to the Commission for its decision. This, we understand, will not be undertaken by the Court. It will not seek to pass upon "the question of the reasonableness and legality of the practices of the parties" since this question has been "subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission."

While the argument thus far made would seem to comprehend the scope of judicial review, we shall proceed briefly to show that the conclusions of the Commission are in conformity with the consensus of authority.

(a) The prohibitions of the Elkins Act are not restricted to carriers and shippers but broadly forbid concessions in respect to transportation on the part of "any person, persons, or corporation."

The Car Corporation is not a common carrier. Nevertheless, it is not permitted to conduct its operations in such fashion as to enable shippers to evade the statutory prohibitions. Although its status is that of "a third person", its relations with shippers in the field of interstate commerce are not thereby placed beyond the reach of law. In the comparatively recent case of

Union Pacific R. R. Co. et al. v. United States, et al., 313 U. S. 450 (1941)

this Court held that the prohibitions of the Elkins Act are not restricted to the actions of carriers and shippers only but include "action by any person to bring about discriminations in respect to the transportation of property. * * *"

We quote briefly from the Court's opinion (pp. 462-463):

"* * * Section 1, quoted in note 1, has a provision making it unlawful for any person to give or receive any concession in respect to transportation. A subsequent clause makes the act of giving or receiving a concession a misdemeanor and punishes its violation by 'every person or corporation, whether carrier or shipper.' Obviously a bonus paid by a railway to induce a prospective shipper to locate along its line would be as much a concession under the statute as a reduction in tariff applicable only to the favored shipper. We are of the opinion that such a payment by a person who is not a carrier, if it is a payment 'in respect to transportation,' would be equally violative of the section in question. * * * The appellants' argument that only carriers or shippers are covered is based on the clause stating the punishment to be applicable whether the alleged violator is 'carrier or shipper.' Such an argument assumes that the carrier and shipper clause restricts the ordinary meaning of 'any person.' No reason is advanced for such a restriction. * * * In our view, action by any person to bring about discriminations in respect to the transportation of property is rendered unlawful by the Elkins Act. Any other conclusion would do violence to a dominant purpose of carrier legislation." (Citing with approval the earlier decisions in *Interstate Commerce Commission v. Reichmann*, 145 Fed. 235 (1906) and *Spencer-Kellogg & Sons v. United States*, 20 Fed. (2) 459 (1927).)

In view of these recent and authoritative expressions of the Court, citation of additional decisions to the same effect would be superfluous.

(b) A shipper who reaps substantial profits through the use of privately owned cars obtains thereby a rebate, concession and preference.

It has been shown that the Commission has steadfastly adhered to the principle that the privately owned car may not be used as an instrument of "profits" to the shipper or as a means to an advantage, concession or discrimination in any form. It is worthy of note that the Commission's views are in strict accord with decisions of the courts in cases of cognate character.

In the case of

Interstate Commerce Commission v. Reichmann, 145 Fed. 235 (C. C., N.D., Ill., 1906)

the court upheld the right of the Commission to require an officer of a private carline company to answer the following question:

> "What part of the mileage, or from whatever source, have you given up to shippers during the last six months?"

The propriety of the question turned solely on whether the payment of the car mileage to the shippers would tend to reveal a violation of the Elkins Act. The Court held that by such payment the Act would be violated. In its opinion the Court said, *inter alia*:

> "That the person to whom the payment is made has been, thereby, removed from the level of equality, to establish which the laws were passed, is too plain to justify extended consideration. With respect to the transportation of his property, he is just as much better off than the general run of shippers as the payment amounts to. That net cost of the transaction to him—his

freight expense—has been reduced just that much.'" (p. 237)

The brief for the Oil Works seeks to distinguish this case upon the ground that the sole issue was "the power of the Commission, on examining a witness who was president of a private car company, as to his agreement with a car user in respect of beneficial allowances inducing the shipper's action in transportation." (Appellants' brief, p. 20.) It is plain, however, that no distinction of substance is possible. The question asked by the Commission would have been irrelevant except for the Court's holding that the answer might disclose an unlawful payment of car mileage by the car-owning company to the shipper.

In

Spencer Kellogg & Sons v. United States, 20 Fed. (2) 459 (C.C.A. 2nd, 1927) (Certiorari denied, 275 U. S. 566)

a rebate or concession was accomplished through the payment by an elevator company to a shipper of a portion of the allowance made by the rail carrier for the elevation of grain in transit from water to rail. The carrier had no part in the transaction. Nevertheless, the payment was held to be in violation of the Elkins Act, irrespective of the fact that the elevator company was not a common carrier but an intervening third person. The Court said:

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6. This decision was cited with approval by this Court in a footnote on p. 463 of the opinion in *Union Pacific Railroad Co. v. United States, supra*, in the following terms: "See Interstate Commerce Commission v. Reichmann, 145 F. 235, 240, rebate by non-carrier private car company to shipper, decided prior to the addition of the clause 'whether carrier or shipper' by the Act of June 29, 1906."

"Congress intended to prohibit all rebates, concessions or discrimination with respect to railroad transportation service. This was not confined to the regulation of carriers and shippers." (p. 461.)[7]

The brief for the Oil Works seeks to distinguish this case from the instant case (Appellants' brief, p. 20), but they are plainly analogous in this, that in each instance an intermediary is the means through which a shipper obtains a payment which in effect reduces his transportation charges. A single governing principle is involved, and that principle is that a shipper is not permitted, through the action of an intervening third party furnishing a service or an instrument of transportation, or otherwise, by any device, to defeat tariff rates or to obtain an advantage.

The recent decision of the Circuit Court of Appeals for the 7th Circuit in

Ohio Tank Car Company v. Keith Railway Equipment Company, 148 Fed. (2) 4 (1945) (Certiorari denied by this Court on October 8, 1945, 66 Sup. Ct. 38)

is squarely in point. There, as here, the shipper-lessee of certain privately owned cars brought suit against the car-owning company for mileage allowances which had

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7. The decision in the case here cited likewise received the approval of this Court in *Union Pacific Railroad Company, et al, v. United States, supra.* This Court said, upon page 463 of its opinion: "For example, in Spencer Kellogg & Sons v. United States, 20 F. (2) 459, a grain elevator owner, without carrier affiliation or cooperation, was convicted for sharing its allowance for elevation service with a shipper."

been withheld by the car-owning company upon the ground that payment to the shipper-lessee would violate the Elkins Act. The District Court ruled that such payments would be violative of the Act and its judgment was affirmed upon appeal. In the course of its opinion the Circuit Court of Appeals said (p. 7):

> "It seems clear that plaintiff, even though its charter permitted it to do so, could not engage also in the business in which Akin is engaged, and participate in an allocation between the plaintiff and defendant of the mileage allowance earned by the cars, without running counter to the quoted provisions of the Elkins Act. Otherwise, plaintiff, as a seller and shipper of oil, then would be receiving an advantage not extended to its competitive sellers and shippers of oil."[8]

Thus, the rulings of the courts conform with the rulings of the Commission in holding that the privately owned car may not be so used as to defeat the prohibitions of the Elkins Act against rebates, concessions, preference or advantage in any form.

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8. In Appellants' Brief (pp. 19-20) an effort is made to distinguish this case upon the ground that it involved "an arrangement whereby a shipper received the benefit of a concession in freight charges through payments made to its wholly-owned subsidiary where the officers, directors and stock owners of both companies were the same." It is plain, however, that the attempted distinction is devoid of either technical or substantial merit. Indeed, the decision in the cited case is the stronger inasmuch as the recipient of the excess of the car mileage over the rental was not the shipper itself but a separate corporation under common control with the shipper. In the instant case, on the other hand, the shipper is the direct beneficiary of the arrangement.

(c) Performance under contracts must conform with statutory requirements.

Argument is hardly needed to sustain the generic principle that "private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict." The quoted words are from the opinion of the Supreme Court of the United States in

Union Dry Goods Co. v. Georgia P. S. Corp., 248 U. S. 372, 375 (1919).

The cases which declare and enforce this principle are numerous, and included among them are many which have arisen under the Interstate Commerce Act and related statutes. A few citations will suffice.

United States v. Union Stockyard & Transit Co., 226 U. S. 286, 309 (1912);

New York, New Haven & Hartford R.R. v. I.C.C., 200 U. S. 361, 402 (1906);

Armour Packing Co. v. U. S., 209 U. S. 56, 81-82 (1908);

Louisville & Nashville R.R. v. Mottley, 219 U. S. 467, 474 (1911).

When it appeared that further payment by the Car Corporation to the Oil Works of the excess of the car mileage over the car rental would result in substantial profits to the Oil Works through the use of the leased cars, it was incumbent upon the parties to conform their practices under the car service agreement to the requirements of law. They were placed on definite notice of their duty in this respect by the report of the Commission in *Use of Privately Owned Refrigerator Cars*, 201 I.C.C. 323

(1934), in which it was held that the profits represented by such excess mileage payments constitute a rebate or concession. Thereupon the Car Corporation felt compelled to modify its practice under the contract so as to limit the car mileage credits to the amount of the car hire or rental payable by the Oil Works. Following this change in practice the Oil Works has been denied its expected profits but it has been fully reimbursed for the costs actually incurred by it in the use of the leased cars. It has been shown heretofore that the Oil Works incurred no expenses, other than the car hire or service charges, in the use of the cars and for which an allowance may be claimed either through car mileage payments or otherwise.

Thus, since July, 1934, in obedience to the principles announced by the Commission, particularly in its report in *Use of Privately Owned Refrigerator Cars*, 201 I.C.C. 323 (1934), abuses in the use of privately owned cars have been effectively suppressed. (R. 193-4) It is not permitted to car-owning companies and shippers to enter into arrangements or engage in practices whereby the shippers are enabled to reap "profits" in varying amounts out of the excess of the car mileage allowances over their car hire or rental. Privately-owned cars are not presently employed as instruments whereby rebates and concessions may be obtained and preference and discrimination may be practiced.

Let us briefly consider the consequences which would flow from disapproval of the principles which the Commission has followed and to which it has adhered in the instant case. Jungle law would return to hold sway over the practices of car-owning companies and shippers in the

use of privately owned cars. The arrangements and practices would vary with the varying force of "shipper pressure", and the shipper possessed of the greater power or skill in bargaining would inevitably have the advantage over his competitors. Rebates and concessions in fact would flourish, and preference and discrimination would be unrestrained. To exemplify, we may postulate alternative arrangements with different shippers as follows:

> First, a lease, contract or other arrangement whereby the shipper-lessee receives the entire excess of the car mileage earnings over the car hire or rental;
>
> Second, a lease, contract or other arrangement whereby the shipper-lessee receives but one-half of the excess of the car mileage earnings over the car hire or rental;
>
> Third, an arrangement whereby the shipper-lessee is credited with the car mileage earnings in the amount of his car hire or rental, and not more.

It should be exceedingly plain that these three shipper-lessees are not upon "*that absolute level of equality*", in the use of cars, which the statute was designed to accomplish. It is equally clear that the shipper-lessee who reaps substantial profits, measured by the excess of the car mileage earnings over the car rental, has received money which, in fact, reduces his transportation cost. If his car hire is $30.00 per car per month while the car mileage earnings paid over to him amount to $50.00 per car per month, he enjoys an effective rebate of $20.00 per car per month. In the words of the court in *Interstate Commerce Commission v. Reichmann*, 145 Fed. 235, 237 (1906), "*the net cost of the transaction to him—his freight expense—has been reduced just that much.*"

It is not an answer that the carrier is not a knowing participant. We have noted that the Act forbids concessions in respect to transportation by "any person, persons, or corporation". Moreover, the source of the car mileage payments is in the revenues of the carriers, and the circumstance that a private car-owning company may be the medium through which payment to the shipper is accomplished cannot serve to alter the effect of the transaction. It would still be the fact that payment of the excess car mileage to the shipper would result in his obtaining transportation service "at a cost below the regular tariff".

The cases which have been postulated above are not hypothetical merely. The record before the Commission affords concrete exemplification of the practices which have been indicated as well as of the results which they yield. The business of supplying privately owned cars to shippers is a competitive business. The contractual relations between the Oil Works and the Car Corporation are of long standing. Prior to the year 1925 it was the practice of the Car Corporation under its contracts with the Oil Works to credit the latter with car mileage only to the extent of the car-hire. Under that practice there was no "profit" to the Oil Works in the use of the cars. In 1925 competitive pressure forced the Car Corporation to make a contract whereby the full amount of the car mileage earnings would be credited to the Oil Works. Again, yielding to a further manifestation of the competitive element, the Car Corporation lowered its car service charge, in the contract entered into with the Oil Works in September, 1933, to become effective on January 1, 1934, from the prior rate of $32.50 per car per month to $27.50 per car per month.

(R. 189-191). This concession was made "in order to hold the business". (R. 198)

The record shows further that during the years 1934 to 1936, inclusive, the Car Corporation was supplying tank cars to shippers under various contractual arrangements. These arrangements differed with respect to the provisions for payment to shippers of the excess of the car mileage over the car service charges. "It was a matter of meeting the competition." (R. 190, 192). The Car Corporation has likewise furnished cars from time to time upon "assignment", that is, upon special request rather than under any formal contract. In such instances the car mileage earnings are collected and retained by the Car Corporation, no payment being made to the shipper. (R. 192)

This review of the record could be extended but we think the foregoing will suffice to exemplify the inequalities which would exist among shippers in the use of privately owned cars if arrangements for the use of such cars were to be determined by "the haggling of the market-place". Such results are unavoidable if the parties are free to make arrangements whereby the excess of the car mileage earnings over the car rental are to be paid over to the shipper-lessees, either in whole or in part.

The Commission finds in its report that during the years 1926 to 1933, inclusive, the mileage payments made by the Car Corporation to the Oil Works exceeded the car rental by $161,684.94. The record also shows that during the period of three years covered by the contract with which we are here concerned (1934-1936), the excess of the total mileage earned over the total car hire or service charges amounted in the aggregate to $64,232.02. (R. 203, 235)

Reduced to a monthly basis, the excess car mileage amounted on the average to $33.04 per car per month. This is the measure of the "profit" realizable by the Oil Works under the terms of the arrangement between the parties.

The Oil Works insists that the excess of the car mileage earnings over the car hire or rental may be paid over to it without violation of law and has asked the Commission so to find and order. In the prayer of its petition to the Commission the Oil Works asks that the Commission enter its order holding that payment by the Car Corporation to the Oil Works of the amounts collected as mileage allowances by the carriers "may be made as provided in and for the entire period covered by the agreement of the parties dated September 28, 1933, without the violation of any provisions of the Elkins Act, and that the payments so made are reasonable and will not accomplish a rebate, concession or an advantage or discrimination * * *." (R. 51, 240) But the Commission has held to the contrary. Its holding is in these terms (R. 245-6):

> "The payment by the Tank Car Corporation to the Oil Works of moneys received from the rail carriers in respect of the transportation of the Oil Works' goods, over and above the amount of money paid by the Oil Works to the Tank Car Corporation as rental for the cars furnished and used would, in our opinion, constitute a rebate and discrimination and involve a departure from the tariff rules applicable, prohibited by Section 1 of the Elkins Act, and Section 6(7) of the Interstate Commerce Act, and we so find."

By this holding the Commission has directly answered the prayer of the petition filed by the Oil Works with the Commission. In the result the Commission has done no more than to rule that the practices of the parties under the contract must conform with the requirements of law.

IV.

THE COMMISSION HAS NOT ASSUMED TO DECIDE THE CIVIL ACTION IN ASSUMPSIT PENDING IN THE DISTRICT COURT: NEITHER HAS THE COMMISSION "USURPED THE FUNCTION OF THE DISTRICT COURT."

It is difficult to believe that this particular criticism of the Commission's action has been seriously tendered. We have seen that by its prior decision this Court expressly ruled that "the question of the reasonableness and legality of *the practices of the parties* was subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission." (Emphasis supplied) That question had been raised by the Car Corporation's plea in defense, and it was that question, and none other, which this Court held to be administrative in character.

The case was remanded to the District Court to be there held "pending the conclusion of an appropriate administrative proceeding." The hand of the District Court having thus been stayed, the appellants filed their petition with the Commission asking that an investigation be made of the practices of the parties under the agreement and that the Commission determine the administrative question which had been entrusted to it by this Court. Upon investigation the Commission determined that the practice of paying car mileage allowances to the Oil Works in amounts ex-

ceeding the car rentals payable under the agreement "would be unjust and unreasonable, and would unduly prefer the Oil Works as a shipper of its commodities * * *." (R. 250) That determination having now been made, in proper course it will presumptively be brought to the attention of the District Court, which will thereupon be freed from stay. Action on the part of the Commission is a condition precedent to a judgment in the action in assumpsit pending in the District Court. The appellants, therefore, fail to give effect to the prior ruling of this Court when they complain that the Commission has assumed to decide the civil action. The Commission has done no more than to make the determination which must be made in order to permit the District Court to proceed.

The Commission has made no order forbidding the payment of the moneys in dispute to the Oil Works. It has made its findings and conclusions and thereupon ordered that the proceeding be "discontinued". (R. 260, 261.) The order was not "an order of dismissal" of appellants' petition, as inexactly stated in the brief for the Oil Works (p. 7). Clearly there is nothing in what the Commission has done which can be challenged as an usurpation of the function of the District Court.

V.

AN ADMINISTRATIVE ORDER OF THE COMMISSION IS SUBJECT TO JUDICIAL REVIEW TO THE EXTENT ONLY OF DETERMINING WHETHER THE ORDER IS WITHIN THE SCOPE OF THE COMMISSION'S AUTHORITY AND THE BASIC PREREQUISITES OF PROOF HAVE BEEN SATISFIED.

The Court is not an appellate administrative tribunal. The scope of review permitted to the Court is definitely limited. As this Court said in

United States v. New River Company, 265 U.S. 533, 542 (1924):

"The courts will not review determinations of the Commission made within the scope of its powers or substitute their judgment for its findings and conclusions."

In the more recent case of

Rochester Telephone Corporation v. United States, 307 U.S. 125, 139-140 (1939),

it was held:

"Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable."

There are many other decisions to the same effect but it will be unnecessary to cite them. Beyond question the Commission has acted within the scope of its constitutional and statutory power. This Court has ruled that this issue is administrative in character and that it is within the competence of the Commission. Certainly also the basic prerequisites of proof have been satisfied. The order is therefore incontestable and a reviewing court will not substitute its judgment for the judgment of the Commission.

This is a case which will determine whether there is to be a revival of the now discredited practice of using the private car as a means or device for obtaining rebates, concessions and preference. It would be impossible to sup-

press these evils, long condemned by the Commission, if this shipper were permitted to recover car mileage in amounts exceeding the rental paid for the use of the cars because, if contracts providing for the payment of such amounts in excess of the car rental were enforceable, such contracts would be made. The circumstances under which the private car business must be conducted make that inevitable. Here the shipper frankly asserts the right to derive such advantages from the use of this instrumentality of transportation, even though it might "result in some shippers enjoying a profit and possibly transporting their commodities at a lesser rate than others * * *." (Appellants' Brief, p. 29) If the shipper should succeed in attaining that objective, notwithstanding the Commission's determination of the question committed to it by this Court, the practical result would be effectively to nullify the prohibitions of the Elkins Act as far as the use of privately owned cars is concerned.

CONCLUSION

(1) The Commission has heard and determined the administrative question formulated by this Court and raised in the petition filed with the Commission by the Oil Works;

(2) The Commission's determination is "within the competence of the Commission," as declared by this Court;

(3) A full and adequate hearing was afforded;

(4) The Commission's findings and conclusions have full record support;

(5) The Commission's determination of the administrative question is final and conclusive.

The final decree of the District Court should be affirmed.

Respectfully submitted,

(Signed) W. S. Hefferan, Jr.,
(W. S. Hefferan, Jr.)
135 South LaSalle Street,
Chicago 90, Illinois.

(Signed) Kenneth F. Burgess,
(Kenneth F. Burgess)

(Signed) Douglas F. Smith,
(Douglas F. Smith)
11 South LaSalle Street,
Chicago 3, Illinois.

(Signed) Allan P. Matthew,
(Allan P. Matthew)
1500 Balfour Building,
San Francisco 4, California.

Attorneys for General American Transportation Corporation, Appellee.

(Signed) Sidley, Austin, Burgess & Harper,
(Sidley, Austin, Burgess & Harper)
11 South LaSalle Street,
Chicago 3, Illinois.

(Signed) McCutchen, Thomas, Matthew, Griffiths & Greene,
(McCutchen, Thomas, Matthew, Griffiths & Greene)
1500 Balfour Building,
San Francisco 4, California.
of Counsel.

Dated at San Francisco, California, March 18, 1946.

(APPENDIX FOLLOWS)

APPENDIX

STATUTORY PROVISIONS INVOLVED

Elkins Act. Sec. 1, pars. 1 and 2:

"That * * * it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars; *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years,

or both such fine and imprisonment, in the discretion of the court. * * *"

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act." Act of Feb. 19, 1903, c. 708, 32 Stat. 847, as amended by Act of June 29, 1906, c. 3591, 34 Stat. 587; 49 U.S.C., Sec. 41 (1) and (2).

Interstate Commerce Act, Sec. 1 (3):

"* * * The term 'transportation' as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." Act of Feb. 4, 1887.

c. 104, 24 Stat. 379, as amended by Act of June 29, 1906, c. 3591, 34 Stat. 584, by Act of June 18, 1910, c. 309, 36 Stat. 545, by Act of Feb. 28, 1920, c. 91, 41 Stat. 474, and by Act of June 19, 1934, c. 652, 48 Stat. 1102; 49 U.S.C. § 1 (3).

Interstate Commerce Act, Sec. 6 (7):

"No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.". Act of June 29, 1906, c. 3591, 34 Stat. 587, as amended by Act of Feb. 28, 1920, c. 91, 41 Stat. 483; 49 U.S.C., Sec. 6(7).

Interstate Commerce Act, Sec. 15(13) as it read prior to amendment on Sept. 18, 1940:

"If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section." Act of June 29, 1906, c. 3591, 34 Stat. 590, as amended by Act of June 18, 1910, c. 309, 36 Stat. 553, and by Act of Feb. 28, 1920, c. 91, 41 Stat. 488; 49 U.S.C., Sec. 15(13).

Interstate Commerce Act, Sec. 15(13) as amended on Sept 18, 1940:

"If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be *published in tariffs or schedules filed in the manner provided in this chapter and shall be* no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for

the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section." Act of June 29, 1906, c. 3591, 34 Stat. 590, as amended by Act of June 18, 1910, c. 309, 36 Stat. 553, by Act of Feb. 28, 1920, c. 91, 41 Stat. 488, and by Act of Sept. 18, 1940, c. 722, 54 Stat. 912; 49 U.S.C., Sec. 15(13). (Italicized words added by amendment of Sept. 18, 1940.)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1945.

No. 428.

EL DORADO OIL COMPANY AND EL DORADO TERMINAL COMPANY, Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL AMERICAN TRANSPORTATION CORPORATION, ET AL., Appellees.

Appeal from the District Court of the United States for the Northern District of California.

On Further Hearing

BRIEF FOR THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL., Appellees.

J. Carter Fort,
Thomas L. Preston,
Counsel for Appellees.

Washington, D. C.
March 18, 1946

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IN THE

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OCTOBER TERM, 1945.

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EL DORADO OIL COMPANY AND
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vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL AMERICAN TRANSPORTATION CORPORATION, ET AL., *Appellees*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

On Further Hearing

BRIEF FOR THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL., Appellees.

Foreword

This brief is filed on behalf of The Alabama Great Southern Railroad Company, et al., the rail carriers who were respondents in the proceeding before the Interstate Commerce Commission (*Allowances for Privately Owned Tank Cars*, 258 I. C. C. 371) and intervened as defendants in the court below. By motion to affirm, appellees United States of America and Interstate Commerce Commission challenged the jurisdiction of the District Court and moved for affirmance upon substantially the grounds stated in the

opinion of that Court as the basis of its action in dismissing the suit. 59 Fed. Supp. 738. After hearing argument on the jurisdictional point, this Court set the case down for further argument on the merits on the assumption that the District Court has jurisdiction.

Accordingly, this brief will be directed to the validity of the Commission's action which is here under attack. It will be confined in the main to emphasis upon certain factors which, in the view of the rail carrier appellees, demonstrate the importance as well as the propriety of sustaining the Commission's order.

I.

The Action of the Commission Was In Accordance With An Established Principle Of The Administrative Law Of Railroad Regulation.

These appellees have no direct pecuniary interest in the action in assumpsit to which the proceedings before the Commission here involved were ancillary. See *General American Tank Car Corporation* v. *El Dorado Terminal Co.*, 308 U. S. 422, 60 S. Ct. 325, 84 L. Ed. 361. They recognize, however, that the findings and conclusions of the Commission which are incorporated in the order here under attack embody an established principle of the administrative law of railroad regulation which has resulted in the elimination of serious abuses in connection with the use of private cars in railroad transportation. They are greatly concerned that no backward step now be taken which would make it impossible for the Commission to protect the practice of using private cars from abuses which have existed in the past.

The conclusions, findings and order of the Commission were set forth as follows in its report (*Allowances for Privately Owned Tank Cars, supra*, at pp. 380-1):

"We therefore conclude and find:

"(1) That the rental paid or to be paid by El Dorado

Oil Works to General American Tank Car Corporation under the terms of the lease agreement between those parties, dated September 28, 1933, was the only cost incurred by the former in furnishing the tank cars in which its shipments moved. A just and reasonable allowance as a maximum to have been paid by the respondents, rail carrier or carriers to the Oil Works for the furnishing of such cars would have been an amount not to exceed such rental. Such an amount and allowance has been paid to the Oil Works through credits made to the account of the Oil Works by the Tank Car Corporation.

"(2) That an allowance to the Oil Works by the respondents, rail carrier or carriers, or by the Tank Car Corporation, under the agreement; in excess of said rental would be unjust and unreasonable, and would unduly prefer the Oil Works as a shipper of its commodities transported by it in the tank cars here involved. The amount paid by the Tank Car Corporation to the Oil Works prior to July 1, 1934, under the terms of the agreement, to the extent it was in excess of the rentals due thereunder, was unjust and unreasonable, and unduly preferred the Oil Works as a shipper of its commodities.

"(3) That the Oil Works is entitled to no allowance from the respondents, rail carrier or carriers, directly or through the Tank Car Corporation, for the special cleaning and preparation of the tank cars during the period of the agreement, January 1, 1934, to December 31, 1936.

"An order will be entered discontinuing this proceeding."

As early as 1903, in its Seventeenth Annual Report, at pages 22-26, the Commission discussed "The evils resulting from the use of private cars" and observed with respect to privately owned stock cars that

"To insure the use of these stock cars by leading shippers—who are often prominent packers—it is charged to have been the practice of the concerns owning such cars to divide with the shippers the mileage received from the railroad companies, a practice which operated to the same effect as the payment of rebates

to such shippers, thus placing their smaller competitors at an unfair disadvantage." (p. 24).

The unlawfulness of the practices by which shipper lessees of private cars were enabled to reap substantial profits out of mileage allowances paid by the carriers to the car owners was declared in unmistakable terms in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323, 382-3. The Commission there held

> "that the payment in whole or in part to shippers, including meat packers, of mileage earnings by railroads either direct or through car owners in excess of the amount of rental said shippers pay for the use of the cars and other actual expenses in connection therewith results in such shippers receiving transportation of their products at lower rates than those paid by shippers generally who use cars furnished by the carriers and at less than the published rates."

Although the findings there made related only to privately owned refrigerator cars, it was definitely stated that "the general principles enunciated apply equally to all types of private cars" (p. 382).

As recently as November 1, 1940, in its Fifty-Fourth Annual Report, the Commission called attention to the unlawfulness of the practice here involved. The following language is taken from page 74 of that report:

> "Other instances of the granting of concessions to shippers were revealed by investigations of the methods employed by private car companies in connection with the leasing by them to shippers of equipment which those shippers furnished to railroads for transportation of their own shipments. The car companies paid to the shippers, out of the mileage allowances which the former received from the railroads, greater amounts than the rentals paid to them by the shippers for the use of the equipment, and thus put the shippers in a position where they received transportation of their goods at less than the lawful rate."

Thus, the doctrine which controlled the report and order of the Commission which is here under attack—that a shipper who leases private cars in which his shipments move shall not be permitted to receive payments for the use of such cars, either directly from the railroads or through the car owner, in excess of the cost to him of furnishing the cars—has been for many years an integral part of the settled administrative law of railroad regulation. The practices of the private car companies and shippers have been conformed to this doctrine, as is indicated by the fact that since the decision in *Use of Privately Owned Refrigerator Cars, supra*, in 1934 the General American Transportation Corporation has made no payments in excess of car rental to any shipper using its cars.

II.

This Court Has Ruled That The Lawfulness Of The Practice Here Involved Is An Administrative Question To Be Determined By The Commission.

In *General American Tank Car Corporation* v. *El Dorado Terminal Company, supra*, the case which gave rise to the proceeding before the Commission, this Court definitely and clearly ruled that the question as to the lawfulness of arrangements between shippers and private car owners under which shippers may be enabled to reap substantial profits out of the allowances paid by the railroads to the car owners is an administrative question to be determined by the Commission. Not only did the Court hold that the controversy there before it involved an administrative question which could be determined only by the Interstate Commerce Commission, but it clearly identified that administrative question. It pointed out that the courts could not proceed further until the Commission had passed upon "the validity" of the payments provided for by the contract between the shipper and the car owner in so far as such payments exceeded the car rentals.

After explaining that the District Court had reached the conclusion that such excess payments would be unlawful

and that the Circuit Court of Appeals had reached the opposite conclusion, this Court said at page 428:

> "We hold that the District Court had jurisdiction but that, upon disclosure of the terms and operation of the lease contract, it should not have proceeded to adjudicate the rights and liabilities of the parties in the absence of a decision by the Commission with respect to the validity of the practice involved in the light of the provisions of the Interstate Commerce Act."

Again at page 433, the Court said:

> "When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. There should not be a dismissal, but, as in Mitchell Coal Co. v. Pennsylvania R. Co., supra, the cause should be held pending the conclusion of an appropriate administrative proceeding. Thus any defenses the petitioner may have will be saved to it."

It is significant that this Court not only defined the administrative question in this explicit language but, further, expressed its approval of the Commission's determination of a similar question in *Use of Privately Owned Refrigerator Cars, supra.* In this regard the Court said at pages 431-432:

> "If it should appear that, with respect to the tank cars in question, the shipper-lessee is making substantial profits on leased cars, by reason of the excess of the mileage allowances over the rentals paid, it might in the light of all the facts be found that the shipper is, in the result, obtaining transportation at a lower cost than others who use cars assigned them by the carriers or their own cars. The Commission has found that, in the case of refrigerator cars, held under similar leases, this has been the case, (Use of Privately Owned Refrigerator Cars, 201 I. C. C. 323). The inquiry into the lawfulness of the practice is one peculiarly within the competence of the Commission."

III.

The Commission Properly Limited Its Inquiry and Decision to the Propriety of Payments to Appellants, as Shipper-Lessees, in Excess of the Cost to Them of Furnishing Cars.

Basing their arguments entirely upon general language in the earlier part of this Court's opinion in *General American Tank Car Corporation v. El Dorado Terminal Company, supra*, appellants contend that the Commission could not direct its inquiry to the practices of the El Dorado company and General American under their lease contract but was required to institute a general investigation for the purpose of prescribing a mileage allowance for all shippers to be published in the railroad tariffs. Aside from the fact that an order fixing a general mileage allowance to be published in railroad tariffs could operate only as to the future and, therefore, would be of no assistance in the present controversy, which involves only past practices, appellants' argument ignores that fact that this Court specifically ruled that "the question of the reasonableness and legality of the practices of the parties"—i.e., the practices of El Dorado Company and General American—was the administrative question to be determined by the Interstate Commerce Commission. Appellants' argument also ignores this Court's approval of the finding of the Commission in *Use of Privately Owned Refrigerator Cars, supra*. In that case the Commission did not prescribe a general mileage allowance to be published in the railroad tariffs. The finding there dealt with the propriety and legality of payments to shipper lessees in excess of their car rental and any other actual costs, and the finding was that such payments were unlawful. It was of exactly the same character as the finding of the Commission in the present case.

Appellants' contentions on this branch of the case appear to rest upon an underlying misapprehension that the Commission's only authority in the premises was to establish some kind of uniform maximum allowance for the use of

tank cars generally, and that the Commission was not empowered to deal with a particular shipper or with shipper-lessees as a class. But the statute affords no basis for the view that Congress intended so to restrict the discretion and tie the hands of the Commission.

At the time of the movement of the shipments here involved, 1934-1936, Section 15(13), which has not been amended since in any particular of present significance, read as follows:

> "If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished . . . ."

This language contains no provision or intimation which limits the discretion of the Commission with respect to the determination of reasonable maximum allowances or which requires the Commission to fix a uniform maximum allowance applicable to all, in complete disregard of differing circumstances. The Commission is free to determine reasonable maximum allowances in the light of particular facts and conditions. Otherwise, the purpose of Section 15(13) would be thwarted.

With respect to allowances to shipper-owners or to shipper-lessees, the Commission is under no obligation to fix so-called uniform allowances. To the extent that such allowances are fixed for shipper-owners, they are due not to limitations of the Commission's authority but to practical considerations which have no application to allowances for shipper-lessees.

A special classification for shipper-lessees, and the fixation of the maximum allowance to be received by a shipper-lessee as the cost to him of furnishing the cars in which his

shipments move, are not only well within the discretion of the Commission, but are essential to the effective performance of the Commission's duty with respect to the prevention of rebates, concessions, preferences and discriminations.

If this discretion were not vested in the Commission, it would be powerless to interfere with practices under which a shipper-lessee would obtain unconscionable profits from the simple device of renting private cars for use in moving his shipments. Nothing could better illustrate the possibilities in this connection than the present case. During the period 1926 to 1933, before the decision of the Commission in *Use of Privately Owned Refrigerator Cars, supra*, appellants received allowances for the use of their leased cars which exceeded rental payments by $161,684.94, while for the period 1934 to 1936 corresponding allowances would amount to $64,232.03* (*Allowances for Privately Owned Tank Cars, supra*, at page 375; R. 234A, 235.)

The opinion of this Court in *General American Tank Car Corporation* v. *El Dorado Terminal Co., supra*, makes it plain that in determining reasonable maximum allowances under Section 15 (13) the Commission is under no mandate or obligation to adopt a uniform rule and to ignore special circumstances. We have heretofore considered that opinion and quote here only the following language on Page 432 (308 U. S.):

> "The Circuit Court of Appeals, without supporting evidence in the record as to any specific items, said that there are obviously other expenses which the shipper must bear over and above the actual rental paid. *If this were so, the reflection of those expenses, as well as the rental itself, in the allowance paid by the carrier to the shipper for the use of the latter's cars, would be a matter for the administrative judgment of the Commission* and not for determination by a court." (Emphasis supplied.)

* Of this amount, $9,212.25 accrued prior to July 1, 1934, and has been paid over to appellants. The remaining $55,019.48 they seek to recover.

The above quoted language, together with many other statements in the Court's opinion, completely answers any contention that the authority of the Commission under Section 15 (13) extends only to fixing so-called "uniform" allowances.

It will not be forgotten, however, that the finding of the Commission in this proceeding concerning allowances to appellants, as shipper-lessees, does not depart from uniformity, so far as allowances to shipper-lessees are concerned. On the contrary, it is in accord with the rule announced in *Use of Privately Owned Refrigerator Cars, supra.*

IV.

The Practice Condemned By The Commission In The Report And Order Here Under Attack Was The Same Practice As That Condemned In the Refrigerator Car Case.

In its report in the proceeding here involved, 258 I. C. C. p. 380, the Commission said of the record that it "shows that the abuses found to exist as to refrigerator cars would measurably exist under the terms of the contract, if such terms were observed", and that hence it approved the principles applied in *Use of Privately Owned Refrigerator Cars, supra,* as related to the situation here involved. That the Commission was sound in holding that the abuses found as to refrigerator cars inhere in the practice provided for in the contract between the El Dorado Company and General American would appear obvious from the very terms of the contract itself, coupled with the absence of any showing by appellants that they assumed or incurred any expense beyond their rental cost for the performance of any service or the furnishing of any facility which it was the duty of the carriers to perform or furnish. It would not appear possible to sustain the appellants here without repudiating the Commission's disposition of the *Refrigerator Car Case.* To do so would, in the judgment of these appellees, seriously and perhaps fatally handicap the Com-

mission in the eradication of abuses incident to the use of private cars. The Commission should be placed under no such handicap, for, as this Court said in *O'Keefe* v. *United States*, 240 U. S. 294, 297, "it is not only within its (the Commission's) power, but the law makes it the duty of the Commission to make orders which shall nullify such practices resulting in rebates or preferences, whatever form they take and in whatever guise they may appear."

V.

The Circumstances That The Payments To Appellees Were Made By The Car Owner, Not By The Rail Carriers, And That Consignees May Have Paid The Freight Are Immaterial.

In line with the principle of *O'Keefe* v. *United States, supra*, it becomes quite immaterial that the payments here involved were made by the car owner and not the rail carriers, and that the freight charges may have been paid by the consignees rather than the shipper-lessee of the cars in question. As the Commission pointed out (258 I. C. C. 376-7), unlawful rebates, concessions from the published tariffs, and discriminations may be brought about by the acts of persons not directly in the relation of carrier and shipper. *Union Pacific R. Co.* v. *United States*, 313 U. S. 450; *Spencer Kellogg & Sons* v. *United States*, 20 F. (2d) 459. In the case first cited, this Court said (p. 469):

> "In prior sections of this opinion, it has been pointed out that any concession by any person or corporation in respect to transportation is forbidden by the federal transportation statutes."

And in *Spencer Kellogg & Sons* v. *United States, supra*, cited with approval in *Union Pacific R. Co.* v. *United States, supra*, at p. 463, the Court said (p. 461):

> "Congress did not intend to limit the offense described in it (the Elkins Act) to cases of collusion between the carrier and shipper. What was done by the plaintiff in error is not in dispute, and therefore the

question is whether what was done constitutes an offense by this plaintiff in error, even though it were not established to have been done in collusion with a carrier or with its knowledge or consent. The law was intended to reach either individuals or corporate entities who contribute knowingly and understandingly to a rebate or concession by any manner or device, and the relation which the culprit bore to the carrier is not necessary as a foundation upon which to rest responsibility."

The contention of appellants that no rebate could have resulted to them because the freight was paid by the consignees is fully answered by the report of the Commission, 258 I. C. C., at p. 377, where it is pointed out that the circumstance of consignee payment "does not make it impossible that the Oil Company, as consignor, may have been a party to an unlawful concession from the published rate if paid an undue amount for the service it actually performed." Appellants were shippers over the lines of rail carriers in interstate commerce and whether the freight charges on particular shipments were paid by appellants or by consignees is immaterial. Any concession or rebate to appellants as shippers is forbidden. Undue advantage would accrue to them in their ability by reason of the unlawful rebate to sell their product lower, or if they did not avail themselves of such opportunity the amount of the rebate would enrich them to that extent. See *Northern Central R. Co.* v. *United States*, 241 Fed. 25, 28; *Elgin, J. & E. Ry. Co.* v. *United States*, 253 Fed. 907, 911.

VI.

Conclusion.

In conclusion, we would point out that appellants have had a fair and just hearing before the Commission. They were permitted to present all the evidence they desired to offer. The matter was thoroughly briefed and argued. The Commission's determination of the administrative question is fully supported by the record and is strictly in line with its decision in *Use of Privately Owned Refrigerator Cars*,

supra. This Court has said that "the inquiry into the lawfulness of the practice is one peculiarly within the competence of the Commission." It is respectfully submitted that the action of the Commission in the premises should not be disturbed by the Court.

Respectfully submitted,

J. CARTER FORT,

THOMAS J. PRESTON,

Counsel for Appellees.

Washington, D. C.
March 18, 1946.

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No. 428

In the Supreme Court of the United States

OCTOBER TERM, 1945

EL DORADO OIL WORKS AND EL DORADO TERMINAL COMPANY, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND GENERAL AMERICAN TRANSPORTATION COMPANY, ET AL., APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

ON THE MERITS

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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OPINIONS BELOW

The opinion of the specially constituted district court (R. 33–36) is reported in 59 F. Supp. 738. The report of the Interstate Commerce Commission (R. 237–255) appears in 258 I. C. C. 371.

JURISDICTION

The final decree of the district court was entered on April 9, 1945 (R. 40). The petition for ap-

peal was filed on June 1, 1945, and the appeal was allowed on the same day (R. 41). Probable jurisdiction was noted on October 15, 1945 (Re. 267). The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (28 U. S. C. 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (28 U. S. C. 345).

QUESTIONS PRESENTED

Whether the Interstate Commerce Commission, in determining certain questions arising in an ordinary lawsuit in response to this Court's holding that the questions were committed to its administrative judgment exceeded in any way its constitutional or statutory authority or acted without supporting evidence or contrary to evidence.[1]

STATUTES INVOLVED

The pertinent statutory provisions involved are set forth in the Appendix, *infra*, pp. 36–39.

STATEMENT

This is a direct appeal from the final decree of a specially constituted District Court for the Northern District of California, dismissing a suit brought by the appellants to set aside certain action of the Interstate Commerce Commission. The

[1] Based on the understanding that the Court has not finally decided that it has jurisdiction of the cause, the Government and the Commission respectfully refer the Court to their original brief dealing with that question.

action was taken by the Commission in *Allowances for Privately Owned Tank Cars*, 258 I. C. C. 371 (R. 237), which proceeding was instituted in response to this Court's decision in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, to determine the lawfulness of certain practices with reference to the rental of tank cars.

Appellant El Dorado Terminal Company is a wholly owned subsidiary of appellant El Dorado Oil Works (hereinafter called the Oil Works), which is a corporation engaged in processing coconut oil from copra in plants at Berkeley and Oakland, California, and shipping the product in tank cars in interstate commerce. The General American Transportation Corporation (hereinafter called the Car Company) is a "private car line" rather than a common carrier and is the owner of numerous railroad cars, including tank cars, which it rents or leases to various shippers for the transportation of their products (R. 238).

On September 28, 1933, the Car Company and the Oil Works entered into an agreement under which the former leased to the Oil Works 50 tank cars, designated as "permanent" cars, at a rental of $27.50 per car per month. This lease, a renewal of a previous one, was for the three-year period from January 1, 1934, to December 31, 1936. The Car Company agreed to supply the Oil Works with such additional tank cars as it might need

for the shipment of its products; these additional cars to be ordered by the Oil Works from the Car Company from time to time, as needed. The rental for the additional cars was at the rate of $30 per car per month for the time such cars were in the service of the Oil Works (R. 52–57).

The agreement provided that the Car Company would collect from the railroads all mileage earned by the cars covered by the agreement and "each month credit to the rental or service account" of the Oil Works "all mileage earned by said cars while in the service" of the Oil Works "according to and subject to all rules of the tariffs of the railroads" (R. 55–56).

The tariffs of the railroads, though publishing a general provision for the payment of 1½ cents per car per mile, both loaded and empty, for the use of tank cars of private ownership, contained rules governing the application of the provision which precluded payment of the mileage to the Oil Works under the circumstances of this case. The rules, in effect throughout the period here in question, provided *inter alia* that the mileage would be paid only to the "party" whose "reporting marks" appeared on the cars (R. 110). It was specially provided in the agreement that all the cars covered thereby should bear the reporting marks of the Car Company (R. 52). The mileage was not, therefore, under the terms of the tariff, payable to the Oil Works.

The terms of the agreement were observed for a period of approximately six months or until July 2, 1934, on which date the Commission rendered its decision in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323, 378–381, in which it held that the payment in whole or in part to shippers of mileage allowances by railroads, either directly or through car owners, in excess of the amount of rental such shippers pay for the use of the cars and other actual expenses in connection therewith, results in such shippers receiving transportation of their products at lower rates than those paid by shippers generally who use cars furnished by the carriers, and at less than the published rates (R. 239).

After the issuance of this decision by the Commission, the Car Company refused to credit or pay over to the Oil Works any part of the mileage allowances in excess of the rental reserved in the lease. Until that time the practice had been for the Car Company to collect the mileage, deduct the rental due, and pay the balance to the Oil Works. Thereafter, the Car Company collected the mileage from the railroads, credited the Oil Works with the amount of the rental due, and retained the balance, refusing to pay it over to the Oil Works on the ground that if it did so it would be the instrumentality for the granting of unlawful concessions or rebates to the Oil Works. It appears that both before and after the change

in the practice the aggregate of the mileage earnings each month exceeded the rental due from the Oil Works. Throughout the entire period, therefore, the Oil Works paid nothing to the Car Company for the use of the cars (R. 234, 239).

In June 1935, the El Dorado Terminal Company, as assignee of the Oil Works (its parent company), brought suit against the Car Company in the United States District Court for the Northern District of California to recover the unpaid excess mileage earnings which had accrued from the use of the leased cars up to May 31, 1935. The amount claimed was $18,532.78. Judgment for the Car Company was rendered by the District Court, but was reversed on appeal by the Circuit Court of Appeals, which held (104 F. 2d 903) that the Terminal Company was entitled to the full amount claimed. This Court granted certiorari and subsequently held in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, that the "question of the reasonableness and legality of the practices of the parties was subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission," and that "when it appeared in the course of the litigation that an administrative problem, committed to the Commision, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices

under the terms of the Act." The judgment of the Circuit Court of Appeals was reversed and the cause remanded to the District Court to be there held "pending the conclusion of an appropriate administrative proceeding" by the Commission (308 U.S. at p. 433) (R. 239–240).

Pursuant to a petition subsequently filed with it by the Oil Works and its assignee (R. 43–52) the Terminal Company, the Commission instituted an investigation to determine (258 I. C. C. 371, 374):

> (1) Whether the practices involved under the terms and operations of the lease contract are unlawful in violation of the Interstate Commerce Act;
>
> (2) Whether a reasonable charge or allowance may be paid, and, if so, the amount thereof as a maximum to be paid, by the carrier or carriers by railroads for the use of the tank cars furnished such carriers by petitioners for the transportation of the products of petitioners in interstate commerce from Berkeley and Oakland, Calif., in the period January 1, 1934, to December 31, 1936; and
>
> (3) What findings shall be made, or what rules, regulations, or practices shall be prescribed, or what orders shall be entered to remove any unlawfulness that may be found to exist. (R. 58.)

Numerous common carriers by rail were made respondents in the proceeding (see R. 241). Following a hearing (R. 59–233), in which the said

respondents and the Car Company participated, the Commission issued its report (R. 237–255). The Commission therein reviewed the action of the courts, considered in the light of the record made in the administrative proceeding the reasonableness and legality of the practices involved, and made findings in respect thereof, all in compliance with the direction of this Court in the *El Dorado Terminal Co. Case*, that the Commission's administrative judgment in the premises be obtained. At the conclusion of its report the Commission discontinued the proceeding after stating its conclusions as follows (258 I. C. C., at pp. 380–381):

> (1) That the rental paid or to be paid by El Dorado Oil Works to General American Tank Car Corporation [now the General American Transportation Corporation] under the terms of the lease agreement between those parties, dated September 28, 1933, was the only cost incurred by the former in furnishing the tank cars in which its shipments moved. A just and reasonable allowance as a maximum to have been paid by the respondents, rail carrier or carriers, to the Oil Works for the furnishing of such cars would have been an amount not to exceed such rental. Such an amount and allowance has been paid to the Oil Works through credits made to the account of the Oil Works by the Tank Car Corporation.

(2) That an allowance to the Oil Works by the respondents, rail carrier or carriers, or by the Tank Car Corporation, under the agreement, in excess of said rental would be unjust and unreasonable, and would unduly prefer the Oil Works as a shipper of its commodities transported by it in the tank cars herein involved. The amount paid by the Tank Car Corporation to the Oil Works prior to July 1, 1934, under the terms of the agreement, to the extent it was in excess of the rentals due thereunder, was unjust and unreasonable, and unduly preferred the Oil Works as a shipper of its commodities.

(3) That the Oil Works is entitled to no allowance from the respondents, rail carrier or carriers, directly or through the Tank Car Corporation, for the special cleaning and preparation of the tank cars during the period of the agreement, January 1, 1934, to December 31, 1936 (R. 249–250).

Appellants thereupon brought this suit under the Urgent Deficiencies Act; they assumed and contended that the findings of the Commission, above described, coupled with its order discontinuing the proceeding (R. 260–261), constituted an "order" within the meaning of that Act [2] and asked that the same be enjoined and set aside on the grounds, primarily, of lack of substantial evi-

[2] Three-judge district courts (28 U. S. C. 47) have jurisdiction of "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission" (28 U. S. C. 41 (28)).

dence. The United States and the Commission defended on the merits, but also insisted that the District Court, specially constituted as a court of three judges, was without jurisdiction. In its decision (R. 33), the District Court sustained the latter contention and dismissed the complaint for lack of jurisdiction.

At the first hearing on the appeal to this Court the brief and argument of the United States and the Commission were directed to the support of the ground on which the District Court based its decision. The brief and argument of appellants were also largely addressed to the jurisdictional question.

On February 11, 1946, the case was restored to the Docket for argument on the merits "on the assumption that the Court has jurisdiction."

ARGUMENT

I. The Commission's action was responsive to this Court's decision and was within its constitutional and statutory authority

The appellants contend that the findings and determinations made by the Commission in response to this Court's decision in the *El Dorado Terminal Co. Case*, *supra*, not only failed to determine the administrative question referred to by the Court but assumed in excess of its constitutional and statutory authority to decide the civil action in assumpsit pending before the District Court. The administrative question referred to

they assert, was not that determined by the Commission but was the question of what was the reasonable uniform allowance applicable to all furnishers of tank cars as a class to be prescribed for publication in the carriers' tariffs. Apparently the appellants do not urge that, once the Commission had determined such question of the uniform allowance applicable to all furnishers of tank cars, the reasonable allowance so determined would be determinative of the question in issue in the action in assumpsit as to the amount of allowance lawfully due the Oil Works. On the contrary, they in effect insist that any determination of that question by the Commission would constitute a usurpation of judicial functions.

In the *El Dorado Terminal Co. case* (308 U. S. at p. 429), this Court explained that shippers requiring a specialized form of freight car for transportation of their products frequently rent the cars from car companies and then furnish them to the railroads. For so supplying the cars used in transporting its products, a shipper is entitled to an allowance from the railroads out of the rates which it pays for the transportation. Any such allowance which would more than compensate the shipper for the expense to which he is put would result in his obtaining transportation at lower cost than shippers generally under the rates and thus amount to a rebate. Section 15

[1] Section 6 (7), Interstate Commerce Act, and section 1 Elkins Act (Appendix, *infra*, pp. 36, 37).

(13) of the Interstate Commerce Act (Appendix, *infra*, p. 37), while authorizing allowances to shippers furnishing services or instrumentalities in connection with their shipments, specially provides that such allowances "shall be no more than just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers * * *." (See 258 I. C. C. 371, 378.)

In *In re Private Cars*, 50 I. C. C. 652, the Commission, following a general investigation into the practice whereby shippers requiring special types of freight cars obtained and furnished such cars for the transportation of their products, found that the practice was not unlawful but worked to the benefit both of shippers and carriers. In connection with privately owned tank cars so furnished to the railroads, the Commission therein prescribed as compensation to the shipper an allowance of 1 cent a mile. As the report in that case shows, this allowance was based on the average cost of car ownership, consisting of such fairly consistent items as interest on investment, depreciation and the like.[4] In its later report, in

[4] In its report in the present case (258 I. C. C., at p. 379), the Commission refers to its report in *In re Private Cars*, 50 I. C. C. 652, saying we there "found that a reasonable allowance for the use of privately owned tank cars would be 1 cent a mile. The figure was based on the average cost of car ownership. In that proceeding the car owners conceded

the *Refrigerator Car Case*, 201 I. C. C. 323, the Commission gave particular consideration to the shipper-lessees of cars and pointed out that the rentals charged by the car companies, which are the principal costs of the shippers in connection with the cars, varied greatly, being governed by no principle or rule except that of the severe competition between the car companies. Because of these conditions and others, including the showing that the rentals are "usually fixed sufficiently low so that the mileage earnings [either paid directly, or through the car companies, to the shippers] will exceed the cost to shippers" (201 I. C. C. 323, 381), the Commission found that such payment of allowances to shipper-lessees in effect constituted rebates or concessions from the published rates and it condemned the payment to or receipt by shipper-lessees of car-mileage allowances in excess of their rental payments and other actual costs.

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that they were not properly entitled to make a profit on their cars used by the carriers. They demanded, as a rule, that the entire cost to them, together with interest on their investment, should be covered by payment for their use. * * *"

[5] In *In re Private Cars*, 50 I. C. C. 652, the Commission gave its approval generally to the use by the railroads of cars furnished by the shippers whether the cars were owned by the shippers or leased from the car companies, but the record, apparently, did not disclose the practices in connection with shipper-leased cars which are described in the later *Refrigerator Car Case*, 201 I. C. C. 323.

In the present case, the Oil Works leased only 50 cars, these being designated as "permanent" cars and the rental called for being $27.50 per car per month. The Car Company, however, agreed to supply such additional cars as the Oil Works might from time to time need, the rental for these being at the rate of $30 per car per month for the time such cars were in the service of the Oil Works. (See Statement, *supra*, pp. 3, 4.) Such an arrangement for a supply of additional cars with rentals based only on the time the cars are in the service of the shipper enables the limiting of the number of permanent cars the shipper would otherwise have to lease to meet its needs and pay for at fixed monthly rentals. It is this, particularly as coupled with a low, competitively-induced basis of rentals, that may result in a "shipper-lessee" receiving concessions from the rates where, as here, the allowances paid to it for furnishing the cars to the railroads bear no relation to its costs in obtaining the cars as reflected by its rental payments.

In the case of the "shipper-lessee" here (the Oil Works), the possibility that the arrangements might have had the above result was recognized

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[8] In contrast to this, a "shipper-owner" (a shipper depending upon cars of its own ownership) must own not only as many cars as the ordinary needs of its business require, but, in addition, a sufficient number to meet its maximum needs, with the attendant costs of ownership, including maintenance, taxes, depreciation, and the loss of mileage whenever any of the cars stand idle.

by this Court's statement in the *El Dorado Terminal Co. case*, 308 U. S. at p. 432, that "as, upon the face of things as disclosed by this record, the shipper is apparently reaping a substantial profit from the use of the cars, a clear case is made for the exercise of the administrative judgment of the Commission."

As shown above the appellants contend substantially that the Commission, by determining the amount of allowance lawfully due the Oil Works and by its findings as to the practices under the lease agreement had assumed to decide the pending civil action in assumpsit; that this Court had not intended that it make such determination and findings but instead had expected it to determine and prescribe for publication in the carriers' tariffs a reasonable uniform allowance to apply to the furnishers of tank cars generally.

In the *El Dorado Terminal Co. case*, this Court makes plain that the administrative questions referred to as involved in the action in assumpsit are the questions particularly in issue in that ac-

In their petition to the Commission (R. 240, 43-52), the appellants neither asserted that the administrative question referred to by the Court was the question of the reasonable uniform allowance applicable to the furnishers of tank cars generally; nor did they ask the Commission to determine and prescribe such character of allowance. At the hearings before the examiner, appellants' counsel raised no issue of that sort either expressly or by proffer of evidence but, instead, sought, apparently, to confine the evidence within narrow bounds (R. 206-211). As stated in their brief (p.

tion, that is, the questions as to the amount of allowance lawfully due the Oil Works and as to the legality of the practices of the parties (308 U. S. 422, 428, 431, 432). Also, this Court's opinion in that case clearly points to the statutory provisions which clothe the Commission with authority in the premises. Referring (p. 429) to section 15 (13) of the Interstate Commerce Act, the opinion states that that provision "governs the payment of allowances for private cars and invests the Commission with authority to find and declare what allowances are just and reasonable." Furthermore, the opinion, while recognizing that the defense set up in the action in assumpsit was based on the Elkins Act (p. 426) makes special reference (p. 431) to the Commission's findings in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323. There (pp. 382–383), the Commission acting under section 6 (7) of the Interstate Commerce Act,* found that the payment, either

—), the appellants, in petitioning the Commission for rehearing, set up as one of the grounds therefor, their contention made here respecting the determining and prescription of uniform allowances, and it appears also (although not of record here) that their counsel expressed such contention in the oral argument before the Commission.

* Section 6 (7) of the I. C. Act is given in full in the Appendix. Similarly as the Elkins Act, it is regarded as holding the carriers to a strict duty to prevent rebating by any device or means. The latter part of the paragraph provides substantially:

"* * * nor shall any carrier charge or * * * receive a greater or less or different compensation for such

direct or through car owners, of allowances to shipper-lessees in excess of their rentals and other actual costs results in such shippers receiving transportation at lower rates than those paid by shippers generally who use cars furnished by the carriers, and at less than the published rates. This finding of the Commission in the case of refrigerator cars is referred to by this Court in the *El Dorado Terminal Co. case, supra*, p. 431, with apparent approval as a standard for the Commission's use in determining whether or not the receipt by the Oil Works of the full sums collected would constitute more than a just and reasonable allowance and thus be unlawful. For the Court there says:

> If it should appear that, with respect to the tank cars in question, the shipper-lessee is making substantial profits on leased cars, by reason of the excess of the mileage allowances over the rentals paid, it might in the light of all the facts be found that the shipper is, in the result, obtaining transportation at a lower cost than others who use cars assigned them by the carriers, or own their own cars. The Commission has

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transportation * * *, or for any service in connection therewith * * * than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

found that, in the case of refrigerator cars, held under similar leases, this has been the case.

The above finding does not mean, as suggested by appellants (Orig. Br., p. 13), that the Oil Works was entitled to some profit (so long as not substantial), but, instead, means that, if the Commission should find that the profit made by the Oil Works on leased cars was substantial, thus showing that it was in the result obtaining transportation at lower cost than shippers generally under the rates, it might find that the receipt by the Oil Works of such full sum was unlawful. It would not be until then that the Commission would go into and determine the question of what was the actual just and reasonable allowance lawfully due the Oil Works.

As support for their contention that the Commission was expected to determine a uniform tank car allowance and was required to prescribe the same as an allowance applying *in futuro*, appellants cite section 15 (13) of the Act, which, prior to the amendments to the Act made in 1940, provided substantially:

> If the owner of property transported x x renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on

> its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers x x x and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders provided for under this section."

The above paragraph (now (13)) of section 15 was added to the Act by the Hepburn amendments of 1906 (34 Stat. 590) which for the first time conferred on the Commission the quasi-legislative authority of prescribing rates, practices, etc., for the future, but, while the paragraph, of course, includes the power to prescribe allowances for future application, it is apparent that it is not limited to authority of such legislative kind.

The Hepburn amendments to the 1906 Act, in amending section 15 so as to empower the Commission to prescribe future rates, used language susceptible of no other meaning, that is, it empowered the Commission "to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed" (34 Stat. 589). In contrast, the amendment to section 15 dealing with allowances neither contains the words "will be" or the words "to be thereafter observed." The language, therefore, does not restrict the Commission to the determining and prescription of future allowances and, since both amendments were made to section 15 at the same time, there is every reason not to

construe the language as imposing such restriction (cf. *Mitchell Coal Co.* v. *P. R. R.*, 230 U. S. 247, 258, 259).

The shipper-lessee in the present case—the Oil Works—had, at considerable expense, furnished facilities of transportation—tank cars—which the carriers were under obligation to provide as part of their public service (308 U. S. 422, 428).* Accordingly, as held by this Court (p. 431), the Oil Works was entitled to a just and reasonable allowance under the plain terms of section 15(13). It is evident from the terms of that paragraph that the allowance so due the Oil Works could not lawfully be more than just and reasonable and also that no tribunal, or body other than the Commission was empowered to say what was such just and reasonable allowance. It follows, therefore, that since the determining of the question by the Commission was wholly within the language of the paragraph, there is no good reason to construe that language otherwise than authorizing the Commission to do so.

* In addition to the first paragraph of section 15 and the paragraph dealing with allowances, the 1906 Act added to section 15, among others, a paragraph (now (14)) which provided (34 Stat. 590):

"The foregoing enumeration of powers shall not exclude any power which the commission would otherwise have in the making of an order under the provisions of this Act."

Neither paragraph (1) nor paragraph (13) of section 15 require the Commission to act in its legislative capacity (Cf. sec. 13 (4)). They simply authorize it to do so. While

As mentioned in the prior brief (pp. 36–38) filed by the United States and the Commission, the decision of the circuit court of appeals in the action in assumpsit reviewed by this Court in the *El Dorado Terminal Co. case*, held that the Oil Works was entitled to the published allowance of 1.5 cents on tank cars. It, apparently, recognized that under its decision the Oil Works would "reap" a profit from its transaction of leasing and furnishing cars but, in its view, the published allowance was applicable and, therefore, the legal amount due. So far as the resulting profit was concerned, it pointed to the fact that, shippers, in furnishing cars to the railroads, were bound to have differing costs and yet, since allowances were required to be published, it was necessary for the Commission to arrive at, and prescribe, uniform allowances based on average costs. Further in this connection it said that it "is inevitable, if the Congressional intent of uniformity of charge by fixed rates, applicable to all suppliers, is to be attained" that a uniform maximum allowance fixed by the Commission and published in the

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Congress, by the Hoch amendments, clothed the Commission with authority of legislative nature, it, of course, did not intend, by that action, to take from the Commission its administrative authority of other kind in the enforcement and carrying out of the Act's provisions. While here, similarly as in the *Refrigerator Car Case*, the Commission made no order, the said paragraph (14) shows the scope of its authority in the premises.

tariffs will "in many cases yield a profit to certain shippers" (104 F. 2d at pp. 909, 911).

This Court, in its opinion in the *El Dorado Case* (308 U. S., at pp. 430, 431) agrees for the most part with the reasoning of the circuit court of appeals but, as pointed out in the prior brief (p. 37), it shows that it is not in accord with that court's view that there is any such "intent of uniformity of charge by fixed rates, applicable to all [shipper] suppliers" of cars as would require or justify the limiting of the number of published allowances to an extent that the allowances "would in many cases yield a [substantial] profit to certain shippers" (104 F. 2d at pp. 909, 911).

In the paragraph of the opinion in the *El Dorado Co. case* (pp. 429–430) above referred to, this Court was, as stated, giving consideration to the reasoning by which the circuit court of appeals arrived at its conclusion that the published 1.5-cents allowance was the applicable and legal allowance due on account of the cars furnished by the Oil Works, as involved in the action in assumpsit. This appears from the substance of the paragraph and also from the succeeding paragraph, in which it is said substantially, that it results that the shipper in this case was permitted by law to furnish freight cars and to be paid a reasonable allowance; that the law requires that the amount and conditions of payment of such allowance be set forth in a published tariff and,

if this is not done, permits the shipper to complain to the Commission to the end that a proper allowance be ascertained and made effective in a tariff schedule. The paragraph then says, "In the present case this was not done. *Nor has the shipper ever applied to the Commission for its decision as to what was a proper allowance for the cars furnished by it.*" [Italics supplied.]

In the next succeeding paragraph (pp. 430, 431), the opinion points out that, so far as the 1.5-cents published allowance was concerned, the "conditions" or rules in the published tariffs precluded the carriers from paying that allowance to the Oil Works. The Court then says:

> The Circuit Court of Appeals has held, and we think correctly, that the shipper—the Oil Works—furnished the cars to the carrier in the present instance. The petitioner did not. The shipper was then entitled, under the plain terms of section 15 (13), to be paid by the carrier a just and reasonable allowance for providing the facility. * * *

The above holding, in and of itself, seems a complete answer to appellants' contentions. This Court had previously stressed the fact that the carriers were under obligation to furnish the cars as part of their public service. In the court case and in the Commission proceeding, an important part of appellants' evidence was directed to show

ing that the carriers did not have readily available the type of tank car necessary for the Oil Works' products. Accordingly, it followed that under the plain terms of section 15 (13) the Oil Works was entitled to a just and reasonable allowance; and, as above stated, it is evident from the terms of the paragraph that no other tribunal or body other than the Commission is authorized to determine and say just what was such reasonable allowance. If the Oil Works had terminated its business and discontinued its shipments, it still would have been entitled to a reasonable allowance for the cars furnished, as involved in the action in assumpsit.

A. The considerations that the payments to the Oil Works were made by the Car Company, not by the carriers, and that the consignees may have paid and borne the freight charges are immaterial

The appellants urge in effect (Br. 17–18) that the fact the allowance payments to the Oil Works were made by the Car Company and not by the carriers takes the case out of the statutory inhibitions of the Elkins Act and section 6 (7) of the Interstate Commerce Act.

In the *Refrigerator Car Case*, the Commission found that the payment to shipper-lessees either direct or through car owners of allowances in excess of their rentals and other actual expenses resulted in such shippers receiving transportation at lower rates than shippers generally who use cars furnished by the carriers, and at less than the published rates. This finding of the Commis-

sion is referred to by this Court in the *El Dorado Terminal Co. case* (308 U. S. 422, 431) with clear approval as a standard for the Commission's use in determining whether or not the receipt by the Oil Works of the full sums collected by the Car Company would constitute more than a just and reasonable allowance and thus be unlawful. The standard, as stated by the Court, is to the effect that, if it appears that the Oil Works is making a substantial profit on leased cars and is thus shown to be obtaining transportation at lower cost than shippers who use cars assigned by the carriers or own their own cars, then the Commission may declare that the payment to, or receipt by, the Oil Works of such full sum would be unlawful. This does not mean, as suggested by appellants (Orig. Br., p. 13), that the Oil Works was, nevertheless, entitled to some profit—some profit just short of one that would be substantial. On the contrary, once the Commission declared or found, such unlawfulness, its administrative judgment, was brought into play to determine what was in fact the just and reasonable allowance due the Oil Works for the cars it had furnished the carriers.

It will be seen that section 15 (13) and section 6 (7) of the Interstate Commerce Act along with the principles embodied in the Elkins Act are involved in the above determinations of the Commission, and this has the sanction of this Court's

statement (308 U. S. 422, 432) to the effect that the policy of the Act is to entrust to the Commission's determinations the matter of "reasonable allowances and practices which shall not offend against the prohibitions of the Elkins Act." The authority placed with the Commission by section 15 (13) to say whether or not an allowance to a shipper furnishing cars is more than a just and reasonable allowance for his contribution to the transportation under the rates he must pay, is its basic authority in any such case." In reaching its determinations, the Commission gives consideration to the prohibitions of the Elkins Act as well as those of section 6 (7) of the Interstate Commerce Act (R. 247), this because the purposes and prohibitions of the Elkins Act are part of the criteria which have been embodied in the standard of justness and reasonableness set up by section 15 (13) from the time of its enactment in 1906. Such standard, nevertheless, is factual and, being such, there was no constitutional inhibition precluding Congress from setting it up as a guide for the Commission's administrative judgment. Its action in this respect was not novel. As repeat-

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[11] In *U. S.* v. *Wabash R. Co.*, 321 U. S. 403, 412, similarly as here, the basic finding was a factual finding with respect to a question committed to the Commission's administrative judgment. Cf. *U. S.* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402. The Commission proceedings involved in both these cases were parts of the general proceeding in *Ex Parte 104*, as was also the *Refrigerator Car Case*, *supra*.

edly stated by this Court, the purposes and policy of the Transportation Act, 1920, are embodied in various of the Act's standards administered by the Commission. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 25.

Since the Commission is expected to give effect to the purposes of the Elkins Act, it necessarily must look to the interpretations placed on that Act by the courts. Speaking of the question of whether rebating may be accomplished through private car companies, the Commission says in its report (R. 244–245):

> Unlawful rebates, concessions from the published and filed tariffs, and discriminations may be brought about by the act of a person who is not directly in the relation of carrier and shipper, as well as by payments by the carrier to the shipper directly. This is illustrated in *Union Pac. R. Co.* v. *United States*, 313 U. S. 450, and *Spencer Kellogg & Sons* v. *United States*, 20 Fed. (2d) 459.

To the same effect see: *Interstate Commerce Commission* v. *Reichmann*, 145 Fed. 235; *Ohio Tank Car Co.* v. *Keith Railway Equipment Company*, 148 Fed. (2d) 4; (certiorari denied Oct. 8, 1945); *Union Pacific R. Co.* v. *United States*, 313 U. S. 450, 463.

The consideration that the consignees may have borne the freight charges was raised in the Commission proceeding, and was found by the Com-

mission to be immaterial (R. 246). This finding or conclusion, is fully supported by the decisions of the courts. *Ohio Tank Car Co.* v. *Keith Railway Equipment Company*, 148 Fed. (2d) 4, 7 (certiorari denied Oct. 8, 1945); *Northern Central Ry. Co.* v. *United States*, 241 Fed. 25; *Elgin, J. & E. Ry. Co.* v. *United States*, 253 Fed. 907, 911.

II. The Commission's findings and conclusions are fully supported by the record

The only claim by the Oil Works of actual expenses (other than the rentals) incurred in connection with its transaction of leasing and furnishing cars to the railroads was on account of the special cleaning and preparation of the cars which the Oil Works regarded as necessary for the carriage of its particular products; and this claim, it is believed, is fully answered by the Commission's report wherein the Commission says (R. 243):

> The petitioners show no item of cost in furnishing the tank cars to the carriers, for which the latter were liable under their obligations as common carriers, other than the rentals. They say that they bore or assumed an average expense of $27.66 for special cleaning and preparation of the cars used. It appears that the railroads, upon request, cleaned in the usual manner all the tank cars furnished. Petitioners do not assert that the Tank Car Corporation or the railroad carriers were obligated to per-

form the special cleaning services, and, at most, they claim that they incurred an expense which should be given consideration in determining their costs. Such special cleaning and preparation as was given the tank cars furnished was not a common carrier obligation of the railway carriers, and consequently the owner of the goods shipped may not be paid an allowance therefor or recompensed by the railroad carriers. The Oil Works undoubtedly would have had to stand the same expense whether it owned the cars, or even if they were furnished by the carriers. *Suitable Cars for Loading Flour*, 128 I. C. C. 442, 444, and cases there cited.

It has been pointed out above (p. 18, *supra*) that the Commission, in finding here (R. 245–246, 248) that the Oil Works would under its contract with the Car Company reap a substantial profit, simply finds and declares that, if the Oil Works were to be paid, or to receive, the full sums collected by the Car Company, the amount would be more than a just and reasonable allowance and thus unlawful as violative of section 15 (13), section 6 (7) and the purposes of the Elkins Act. As stated, this does not mean that the Oil Works was, or is, entitled to "some profit." The finding is a declaration of unlawfulness and, following such declaration, the Commission determined and found just what was the just and reasonable allowance due the Oil Works for the cars furnished

the carriers. Such determination was not, of course, based on the average costs of furnishers of tank cars [12] but on the actual costs of the individual shipper—the Oil Works. That that was the proper basis, seems borne out, not only by the Court's reference to the *Refrigerator Car Case*, but also by its later statement (308 U. S. 422, 432) that:

> * * * The Circuit Court of Appeals, without supporting evidence in the record

[12] In *In re Private Cars*, *supra*, the Commission, in speaking of the publication of allowances on tank cars and other cars, refers to the necessity of basing such allowances on the average expenses of shipper furnishers of cars. The decision of the Circuit Court of Appeals, in referring to the same thing (see p. 21, *supra*) apparently considered that the Elkins Act's purpose of uniformity in rates justified application of the 1.5-cents published allowance in the case of the Oil Works because, as it in effect said, any allowance determined by the Commission and published was bound to yield a profit to certain shippers in many cases. But, whatever may be the necessities in connection with tariff publication, such Elkins Act's purpose of uniformity in rates and charges is, as above stated, a different thing from uniformity of allowances paid to shippers out of the rates for supplying facilities of transportation. In fact, individual allowances exactly measuring the costs of particular shippers in furnishing cars, would not disturb uniformity of application of the rates, whereas allowances based on average costs do have that effect in varying degree. In the *Terminal Allowance cases* (*U. S. v. Wabash R. Co.*, *supra*, and others) allowances covering the "spotting" of cars at unloading points within the plant enclosures of large industries were published in the carrier's tariffs (and under requirement of the Commission), but they were individual allowances based on the widely differing expenses entailed at the various industries involved.

as to any specific items, said that there are obviously other expenses which the shipper must bear over and above the actual rental paid. If this were so, the reflection of those expenses, as well as the rental itself, in the allowance paid by the carrier to the shipper for the use of the latter's cars, would be a matter for the administrative judgment of the Commission and not for determination by a court.

The use by the Commission of the basis of actual costs for allowances under section 15 (13) of the Act dates back many years and the Commission's action predicated thereon has been upheld by the Court in other cases. As early as its 3rd Annual Report to Congress, 1889, (pp. 15–18) the Commission pointed out that excessive allowances to shippers for furnishing private cars resulted in rebates and discriminatory abuses and, in succeeding reports to Congress, it repeatedly referred to the same thing with recommendations for legislation. 7th Annual Rep., 1893, pp. 58–67; 17th Annual Rep., 1903, pp. 22–26; 19th Annual Rep., 1905, pp. 10–11; 20th Annual Rep., 1906, pp. 48–49. In its 1905 Annual Report, similarly as in prior reports, the Commission referred to the abuses worked through the payment of allowances to shippers and recommended that it be given authority to determine whether allowances paid by the carriers constitute "just and reasonable compensation for the service rendered and to fix a

limit which shall not be exceeded." This recommendation was adopted and embodied in an amendment (now appearing as section 15 (13)) which was made to the Act by the Hepburn Act of 1906 (34 Stat. 590); and, since the enactment of that amendment, the Commission has consistently held that the just and reasonable allowance that may be lawfully paid a shipper should not exceed the costs of the shipper in rendering the service or furnishing the facility. *Allowances to Elevators*, 12 I. C. C. 85, 89; *Manufacturers Ry. v. St. Louis, etc., Ry.*, 28 I. C. C. 93, 101; *Chicago West Pullman & So. R. R. Case*, 37 I. C. C. 408; *Allowances to T. G. Sulphur Co.*, 96 I. C. C. 371, 377; *Refrigerator Car Case, supra.*

In *I. C. C. v. Diffenbaugh*, 222 U. S. 42, the Supreme Court set aside an order of the Commission (14 I. C. C. 315) which required (p. 46):

> the Union Pacific to desist from paying *any* allowance to Peavey & Co. on grain in which they have any interest that is not reshipped from their elevators within 10 days, or that has been mixed, treated, weighed or inspected in any of their elevators. * * *.

This order of the Commission, which the Court set aside, was entered after its order in 12 I. C. C. 85, and reflected its views, after further consideration, that the payment of any allowance whatever to a grain elevator company on that part of

the grain handled by it with respect to which it stood in the relationship of an owner and shipper, had the effect of working a rebate. This view the Court held to be a too narrow construction of the statute, but it, nevertheless, sustained the Commission's previous order in 12 I. C. C. 85, which had "cut down" the allowance "to three-quarters of a cent, estimating that to be the actual cost * * *" (pp. 45, 49).[13] Furthermore, in the case of immediate concern here (the *El Dorado Terminal Co. case*), the Court, as above shown, not only says substantially that the question of what expenses should properly be reflected in the allowance paid is one for administrative judgment, but apparently in no way questions the Commission's findings in the *Refrigerator Car case*, *supra*, which are, as appears from the findings themselves, predicated upon the rentals and other actual costs of shipper-lessees.

The Commission, in its report (R. 248–9), adopts the principles applied in the *Refrigerator Car case*, *supra*, as related to the situation here involved, and in this connection it finds:

> The present record shows how under contracts such as the one between the Oil Works and the Tank Car Corporation the Oil Works, as shipper, would reap a profit on the leased cars so substantial in amount,

[13] See reference to *Diffenbaugh Case*, *supra*, in *Lehigh Valley R. Co.* v. *U. S.*, 243 U. S. 444, 446.

> if paid over by the rail carriers out of the transportation charges through the Tank Car Corporation to the Oil Works, as to have the result of enabling the Oil Works thereby to obtain the transportation of the commodity it ships in interstate commerce at a lower cost than others who use cars assigned to them by the carriers, or who own their own cars.

These findings have ample support in the record. The evidence shows definitely that the level of rentals accorded the Oil Works by the Car Company were competitively induced (R. 189–193, 198) and that the contract, when entered into, gave reasonable assurance to such shipper of a substantial profit (R. 202, Exhibit No. 9, R. 234A, 235). The evidence also shows that the Oil Works' prior contract yielded it a sum over the rentals of $161,684.94 (R. 242, Ex. 9, 234A, 235) and under that contract, it paid rental for permanent cars at the rate of $32.50 per car per month (R. 191, 198). Under its succeeding contract (the one here involved), the rental paid by the Oil Works for permanent cars was reduced to $27.50 and the arrangement was continued by which it could obtain as many more cars as needed by payments on the basis of time of actual use (R. 255–260).

During the period of its earlier lease agreement (1926–1933), the Oil Works was never "called upon to make any actual payments", because "the

mileage earnings were always sufficient to cover the amount of the car hire"; and the same was true of its succeeding agreement (R. 195–196). Under this latter three-year agrement, if carried out, the sum over the rentals which the shipper would receive for furnishing the cars would amount to $64,232.03 (R. 234A, 235).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decree of the district court, dismissing the bill of complaint, should be affirmed.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

MARCH 1946.

APPENDIX

Section 41 of Title 28, U. S. C. provides:

> The district courts shall have original jurisdiction as follows:
>
> * * * * *
>
> Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

Section 47 of Title 28, U. S. C. provides in part:

> * * * upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to [three] judges and the same procedure as to expedition and appeal shall apply.

Section 6 (7) of Part I of the Interstate Commerce Act provides:

> No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in

such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. (49 U. S. C. 6 (7).)

Section 15 (13) of Part I of the Interstate Commerce Act provides:

> If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section. (49 U. S. C. 15 (13).)

Section 1 of the Elkins Act provides in part:

> That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and

the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs of rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall,

knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: * * *.

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act. (49 U. S. C. 41.)

U. S. GOVERNMENT PRINTING OFFICE: 1948

SUPREME COURT OF THE UNITED STATES.

No. 428. OCTOBER TERM, 1945.

El Dorado Oil Works and El Dorado Terminal Company, Appellants,
vs.
The United States of America, Interstate Commerce Commission, General American Transportation Corporation, et al.

Appeal from the District Court of the United States for the Northern District of California.

[April 22, 1946.]

Mr. Justice BLACK delivered the opinion of the Court.

Appellants filed a complaint in the district court under 28 U. S. C. 47a, challenging action taken by the Interstate Commerce Commission allegedly pursuant to instructions contained in an earlier opinion rendered by this Court in connection with these proceedings. 308 U. S. 422. The district court dismissed the complaint for want of jurisdiction on the ground that the Commission's action did not amount to a reviewable "order" within the meaning of 28 U. S. C. 41 28. The case is before us on direct appeal. 28 U. S. C. 345.

The following facts constitute the background of this proceeding:

El Dorado Oil Works, one of the appellants, processes, sells, and ships coconut oil in interstate commerce. Special kinds of tank cars are necessary for that distribution. The appellee General American Tank Car corporation[1] owns tank cars which it rents and leases to various shippers. In 1933 Oil Works made a contract with the Car Company to rent, for a period of three years, fifty tank cars at $27.50 per month, and such additional cars as it might need at $30 per month. The outstanding railroad tariffs, prescribing payment by the railroad of 1½¢ per mile for the use of tank cars, contained rules which provided that the mileage would be paid only to the "party" whose "reporting marks"

[1] General American Transportation Corporation has become the successor of the General American Tank Car Corporation.

appeared on the cars. During part of the rental period here in question the rules provided that "mileage for the use of cars in private ownership will be paid . . . only to the car owner—not a lessee." Since under the agreement the cars were to bear the "reporting marks" of the Car Company, and not the Oil Works, and since Oil Works was a lessee, no tariffs authorized railroad mileage payments to Oil Works. Nevertheless, under the agreement Oil Works was to receive the full mileage allowance prescribed by the tariffs. The rent Oil Works was to pay to Car Company was to be taken out by Car Company from the mileage allowances it received from the railroads and the balance was to be paid by it to Oil Works. The railroad payments proved to be greatly in excess of the rental obligations, and Car Company regularly paid the difference to Oil works, until July 1, 1934.

July 2, 1934, the Interstate Commerce Commission, after an exhaustive investigation, handed down its findings, opinion, and conclusion in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323. It there drew a distinction between car owners as a class and car renters as a class. It found that car owners should have sufficient rental allowances, whether they rented to railroads or to shippers, to pay a reasonable return on investment, taking into consideration cost of maintenance, idle cars, etc. On the other hand the Commission found that car renters had no such fixed costs. The Commission's conclusion was that the rent of rented cars to a shipper, including rent and incidentals, was the only allowance the shipper-lessee should receive from a railroad, directly or indirectly, and that if he receives more the cost of transportation to him would be less than the cost of transportation to shippers generally, especially those who use cars furnished by the carriers. To make the railroad pay more for the use of a car rented by a shipper than the rent he had to pay was, according to the Commission, a violation of Section 15 (13) of the Interstate Commerce Act, 49 U. S. C. 15 (13), in that it required the railroad to pay more for the car than was "just and reasonable." The Commission was of the opinion that refunds of mileage in excess of the rent charged the shipper-lessee were the equivalent of an unlawful concession or rebate, prohibited by the Elkins Act. While the Commission's findings were limited to refrigerator cars, it stated that "the general principles stated apply equally to all other types of private cars." *Id.*

After the Commission's decision in the refrigerator case, the Car Company declined to pay over to Oil Works any part of the excess mileage. In 1935 Eldorado Terminal Company, one of the appellants acting as assignee of Oil Works, brought suit against the Car Company to recover accrued excess mileage earnings. Car Company defended on the ground that further refunds would violate Interstate Commerce legislation, particularly the Elkins Act. 49 U. S. C. 41. The district judge found that the contract was in violation of the Elkins Act, and rendered judgment for the Car Company. The Circuit Court of Appeals reversed. 104 F. 2d 993. The Car Company filed a petition for certiorari which was supported here by the Solicitor General and the Interstate Commerce Commission. Their claim that the Circuit Court of Appeals erred rested on the following major grounds: (1) The railroad's payments to Car Company, which provided no facilities to the railroad, were unauthorized; (2) since no published tariff authorized payments to a shipper-lessee such as Oil Works its only recourse to collect allowances for the cars it had furnished, was to institute proceedings before the Commission for recovery of a reasonable allowance; (3) payment to Oil Works of excess mileage earnings received by Car Company would violate the Elkins Act. In reply to the Commission's brief urging certiorari, Oil Works contended that the case did not raise a question "within the administrative or primary control of the Commission."

We granted certiorari and reversed the judgment of the Circuit Court of Appeals. 308 U. S. 422. While we rejected the Commission's contention that the district court had no jurisdiction to hear the case, we accepted its contention that determination of the validity of the challenged past practices was for the Commission. We pointed out that the tariffs approved by the Commission fixed no uniform rate to be paid by railroads to the shipper directly for the use of cars originally rented by the shipper. We pointed out further that Oil Works had never "applied to the Commission for a decision on what was a proper allowance for the cars furnished by it." We said that the Oil Works was "entitled under the plain terms of section 15 (13) [of the Interstate Commerce Act] to be paid by the carrier a just and reasonable allowance" for providing the cars. The

opinion stated that questions such as whether the shipper were "reaping a substantial profit from the cars" and whether, on the one hand the "allowances and practices" were lawful and reasonable, or on the other hand violated the Elkins Act, were all administrative problems calling for investigation and determination by the Commission. The District Court was accordingly ordered to stay its hand so that the Commission could render its decision.

On remand Oil Works and Terminal Company filed a petition with the Commission praying that it hold hearings and enter an order to the effect that Car Company could pay the mileage earnings to Oil Works without violating the Elkins Act and that such payment would not constitute a rebate or concession. The Commission found that a just and reasonable allowance to Oil Works would be the cost incurred by it in furnishing the cars, namely the monthly rental to the Car Company, that any amount in excess of that would be unjust and unreasonable in violation of sec. 15 (13) and would "constitute a rebate and discrimination and involve a departure from the tariff rules applicable prohibited by Sec. 1 of the Elkins Act, and Section 6 (7) of the Interstate Commerce Act . . ."[2] The Commission further or-

[2] The Commission did not rule that a shipper-lessee would always be entitled to allowances equal to the cost to him of the cars he rented. The Commission's opinion makes it clear that a shipper-lessee is only entitled to receive a just and reasonable allowance for cars while they are actually used by the railroad, even though this allowance might be less than the rental paid by the shipper. On that subject the Commission said:

> "In administering the provisions of section 15 (13) we have consistently adhered to two principles, bearing in mind that we have to prescribe the *maximum* amount which the carrier might pay: (1) the amount paid should not be more than was just and reasonable for the service or instrumentality furnished, and (2) that the amount which might be paid should not exceed the reasonable cost to the owner of the goods of performing the service or furnishing the instrumentality used. Whichever of these sums was the lower marked the maximum the carrier might pay."

Here the Commission has applied these uniform criteria in such a way as to permit the shipper-lessee to receive as much as the full rental he paid. Were it not for these proceedings resulting from the Car Company's refusal to continue payments to the shipper the railroad would have had to pay it did pay 1½¢ per mile which proved far in excess of the rental. It that in other cases a just and reasonable rate would fall below the rental. It may be that in this case the rental exceeded what would be a just and reasonable allowance with respect to the use of the cars by the railroad. But this would serve to further reduce the rate to which petitioner was actually entitled; petitioner, therefore, has no interest in challenging the Commission's order on this point.

dered that the proceeding before it be discontinued. On this appeal both sides argued the jurisdictional question as well as questions going to the merits.

Before we reach the merits of the controversy we must at the outset briefly dispose of the jurisdictional question. As the facts already stated reveal, the Commission's findings and determination if upheld constitute far more than an "abstract declaration." "Legal consequences" would follow which would finally fix a "right or obligation" on appellants' part. These findings are more than a mere "stage in an incomplete process of administrative adjudication," for the Commission here has discontinued further proceedings. We, therefore, think that the Commission's action falls within the class of "orders" which *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, held to be reviewable by a district court of three judges. The district court erred in dismissing the complaint for want of jurisdiction.

On the merits, appellant's major contention is that the Interstate Commerce Act and our earlier opinion in this case do not authorize the Commission to determine, as it here has done, the justice and reasonableness of mileage allowances which appellants were to receive on past transactions. The contention is that both our opinion and the Act authorize the Commission to do no more than determine what uniform allowance shippers as a class would be permitted to charge in the future. In part the argument is that insofar as the order is based on a treatment of shipper-lessees as a class apart, and on a limitation of their allowance to the cost to them of the cars they furnish, the order is invalid, in that it neither rests on, nor brings about, a uniform rate to all shippers, or even all shipper-lessees. We cannot agree with the above contentions.

First, it must be noted that the Commission itself, its determination as to the lawfulness of these past practices on the basis of appellants' own application, asking the Commission to do so. Second, our previous opinion, as well as the Interstate Commerce Act, authorized the Commission to make this determination. The question before us when this case was first here did not relate to future but to past allowances. Relying on past decisions, we held that the "reasonableness and legality" of the past dealings here involved were matters which Congress had entrusted to the Commission. *See e. g. Great Northern Railway Company* v. *Mer-*

chants Elevator Company, 259 U. S. 285, 291 and other cases cited in our previous opinion. And we rejected appellants' petition for rehearing which presented substantially the arguments now repeated, namely that any order the Commission might make "could only be effective as to the future," that the Commission's determination "could not affect" the contract in this case, that the Commission's action would be "futile", and that consequently our judgment and opinion would provide no "guidance" for the district court. Our first opinion, buttressed by our rejection of the motion for rehearing, was a plain authorization for the Commission to determine the justice and reasonableness of the past allowances to this shipper. The Commission did not have to establish future uniform rates to determine the questions we sent to it. Consequently, insofar as appellants' argument is that the Commission failed to treat all shippers or all shipper-lessees uniformly because it did not fix future uniform rates, the answer is that it was not required to do so.

Insofar as appellants' argument as to lack of uniform treatment of shippers and shipper-lessees seeks to attack the basis of the Commission's finding that the past allowances here were unjust and unreasonable, it also lacks merit. We think the Commission's finding was based on a uniform treatment of all shipper-lessees. While it is true, as appellants contend, that under the Commission's rule different shipper-lessees might receive different allowances, the rule is uniform in that it permits no shipper-lessee to receive allowances exceeding the rental he pays. All shipper-lessees are prohibited from making profits at the expense of the railroads on cars rented to transport goods in interstate commerce. Since the facts before the Commission were enough to enable it to find that such profits amount to rebates to shipper-lessees which result in a discrimination against shippers that own cars or use cars furnished by the railroads, the Commission was justified in treating shipper-lessees as a class apart. As the Commission pointed out in its Refrigerator case, the history of railroad practices shows that rebates, concessions and favoritism have frequently grown out of the private car system. Notwithstanding the very great transportation service supplied by private cars, designed and equipped to meet shippers' needs, the Commission acts within its power when it attempts

SUPREME COURT OF THE UNITED STATES.

No. 428.—October Term, 1945.

El Dorado Oil Works and El Dorado Terminal Company, Appellants, vs. The United States of America, Interstate Commerce Commission, General American Transportation Corporation, et al.

Appeal from the District Court of the United States for the Northern District of California.

[April 22, 1946.]

Mr. Justice Douglas dissenting in part.

I do not think it should be left to the shipper and the car owner to determine what portion of the tariff paid by the railroad should be paid to the shipper. But that is exactly what the Court permits when it measures the shipper's allowance by the amount of rental he has agreed to pay the car owner.

As Commissioner Splawn pointed out in his dissent from the opinion of the Interstate Commerce Commission (258 I. C. C. 371, 382-383), the Commission in following this course failed to comply with our opinion in *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422. We there said (pp. 429-430):

> "As the Circuit Courts of Appeals has pointed out, different shippers may have differing costs in respect of privately owned cars furnished the carriers. Nevertheless as the allowances to be made them by the carriers for the use of such cars must be the subject of published schedules and must be just and reasonable, the Commission is compelled to ascertain in the light of past and present experience a fair and reasonable compensation to cover such costs and prescribe a uniform rate which will reflect such experience. It is inevitable that some shippers may be able to furnish facilities at less than the published allowance while others may find their costs in excess of it. This fact, however, does not militate against the fixing of a uniform rate applicable to shippers properly classified by the Commission."[1]

[1] Sec. 15 (13) of the Interstate Commerce Act, 49 U. S. C. § 15 (13) provides:

> "If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation or

Unless that course is followed, a situation is sanctioned in which concessions and discriminations condemned by § 1 of the Elkins Act, 32 Stat. 847, 34 Stat. 587, 49 U. S. C. § 41, are likely to thrive.

There is a further objection to the course which the Court sanctions. As stated by Commissioner Splawn in his dissenting opinion (258 I. C. C. at 384):

> "It is elementary that the form of an allowance for the use of cars must be such as to reflect the extent of the use by the railroads of the facilities furnished. Whenever we have had occasion to determine such allowances, we have prescribed either per diem or mileage allowances. The railroads cannot be held responsible for the amount of rent reserved by the Car Corporation in an agreement with the shipper as the car may be left idle during the entire period. The car has value to the railroad only when it is used in transporting lading and results in the payment of freight charges."

Any allowance based on cost to the shipper rather than on the use of the facility furnished violates that principle.

Only an appropriate uniform rate would obviate both of the objections I have mentioned.[2] I would remand the case to the Commission so that it could now do what, according to my understanding, we originally intended it to do in accordance with the requirements of § 15 (13) of the Interstate Commerce Act.[3]

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furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this chapter and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

[2] The Commission's finding was "That the rental paid or to be paid by El Dorado Oil Works to General American Tank Car Corporation under the terms of the lease agreement between those parties, dated September 2, 1933, was the only cost incurred by the former in furnishing the tank cars in which its shipments moved. A just and reasonable allowance as a maximum to have been paid by the respondents, rail carrier or carriers, to the Oil Works for the furnishing of such cars would have been an amount not to exceed such rental. Such an amount and allowance has been paid to the Oil Works through credits made to the account of the Oil Works by the Tank Car Corporation."

There are no facts of record which show the relationship between the rental paid and the extent of the use by the railroads of the facilities furnished. The Commission made no findings in that regard.

Whether a uniform rate which is just and reasonable would be greater or less than the rental is wholly conjectural on the present record.

[3] Note 1, *supra*